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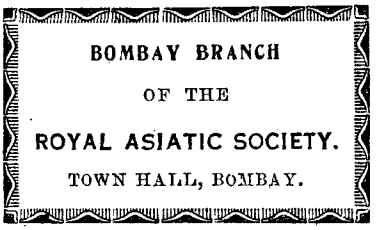


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# THE ELEMENTS OF POLITICS

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OF

# POLITICS

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BY

HENRY SIDGWICK

THE METHODS OF ETHICS' AND 'THE PRINCIPLES OF POLITICAL ECONOMY.'

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London

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# PREFACE

SOME years ago I was strongly impressed with the need of a book which would expound, within a conve[illegible] and in as systematic a form as the subject-[illegible] admit, the chief general considerations that enter into the rational discussion of political questions in [illegible] states. Though there were many valuable treatises dealing with particular portions of this subject, no English writer—so f[illegible] as [illegible] Bentham, attempted to treat it as *a* comprehensive treatm[illegible] must [illegible] appeared to me that ever[illegible] brevity [illegible] vantages. For such a [illegible] ment [illegible] however full, must be for [illegible] pur- [illegible] d an exposition severely [illegible] by [illegible] at any rate have the me[illegible] keeping [illegible] mpleteness steadily before the minds of [illegible] readers. The present work is the result of [illegible] satisfy the need that I have just described. [illegible] n which it has been composed I have en[illegible] explain in the first chapter: it only remains for me [illegible] to record the chief debts that I am conscious o[illegible] owing to previous writers from whom I have derived [illegible]eas, and to express my gratitude to the friends who have [illegible]ided me with criticisms and suggestions.

My general view of Politics was originally derived from [illegible]e writings of Bentham and J. S. Mill [illegible] and the earlier

ortion of the book, which deals with the principles of legislation, is to a considerable extent composed on the lines f Bentham's *Principles of the Civil Code*. But before composing it I have endeavoured to profit by the study of several more recent works on Jurisprudence and the Principles of Law;—among which I may mention especially Austin's *Theory of Jurisprudence*, Holland's *Jurisprudence*, nd Pollock's *Principles of Contract*. In later chapters (xv. nd xvi.) of my first Part, which deal with international relations, I am under special obligations to Hall's *International Law*. I ought to add that in two or three chapters of the first Part—especially x. and xi.—I have had more or less to go over ground already traversed by myself in my *Principles of Political Economy*. So far as this has been the case, I have not hesitated to borrow from my earlier work; though I have tried as much as possible to introduce such differences of treatment as appeare[d] to be different scope and aims of the p[resent]

In the second Part of this book, wi[th] the structure of Government, the views have been partly derived from so grea[t] that I found it difficult to estimate clo[sely] to any one previous writer. Still, am[ong] that I have studied with profit, I am obligations to J. S. Mill's *Representative Gov[ernment]*, *English Constitution*, Todd's *Parliamentary Go[vernment]*, *Law of the Constitution*, and Bryce's *American* I have also found Erskine May's *Parliamentary* Anson's *Law and Custom of the Constitution*, m[ost] useful f[or] reference. Among the foreign books from which I have derived ideas and information, I may specially mentio[n] the works of Gneist and Holzendorff, and Bluntschli's *Leh[re] des Modernen Staats*; also the series of monographs th[at] make up Marquardsen's *Handbuch des öffentlichen Rechts*,

well as Dareste's *Constitutions Modernes*, and Demombynes's *Constitutions Européennes*. Among American books to which I am indebted I may especially mention the *Federalist*, and Story's *Commentaries on the Constitution of the United States*. I wish also to acknowledge my obligations to the *Political Science Quarterly*—edited by the University Faculty of Political Science of Columbia College[1]—and the *Studies in Historical and Political Science*, published under the auspices of the Johns Hopkins University. Finally, in speaking of the works of others by which I have profited, I must not omit to mention an unpublished course of lectures on the relation of Political Science to History, delivered in the University of Cambridge by my friend and colleague, Mr. J. R. Seeley, who has kindly allowed me to read it in MS.

The books and articles by which, after arriving at certain ... ntly found my reasonings sub- ... numerous, that I forbear to ... om them: but I shall make an ... of Mr. Bruce Smith's *Liberty and* ... of the fundamental importance of ... ught which this writer has anticipated ... move.[2]

... he present, there seemed to be a special ... comprehensive and many-sided considera- ... ous topics included. Impressed with the ... sing this unaided, I have allowed myself, in ... its and corrections from others, to encroach on the leis... to trespass on the indulgence of my friends

[1] I regret that the work on *Political Science and Comparative Constitutional Law*, recently published by a member of this faculty—Mr. J. W. Burgess—did not reach me till my own book was so far advanced that I did not feel able to make use of it.

[2] I ought perhaps to add that my political views do not agree closely with those of Mr. Bruce Smith.

to an unusual extent. I am specially grateful to Mr. James Bryce, M.P., and Mr. A. V. Dicey, who have read through the proofs of the whole of the work in its original form;[1] and whose suggestions and criticisms, and *memoranda* on special points, have been of the utmost value to me. The kindness of several other friends—among whom I would especially mention the Earl of Lytton, Mr. F. W. Maitland, and Mr. T. Thornely—has similarly aided me with instructive comments on selected portions of the book which I have submitted to them. One of these latter—Albert Rutson—whose stores of information and reflection were ungrudgingly placed at my service in several letters and conversations, has unhappily been taken from us before the completion of my work.

Finally, for the index appended to the volume, which I hope will materially increase its usefulness, I am indebted to Mr. James Welton, B.A., scholar of [illegible] College.

[1] Several chapters have been subsequently entirely rewritten, in consequence of the criticis[illegible]

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3. These disadvantages are somewhat reduced, in the English constitution, by the power of dissolution which the Cabinet possesses . . . . . 411–414

4. The formal monarch, in the English type of polity, is on the whole a valuable, but not an indispensable, institution: but his value depends on his retaining as much real power as is compatible with complete Parliamentary Government. . . . . 414–419

5. He need not necessarily be hereditary . . . . 419–420

6. English Parliamentary Government leads naturally to a certain fusion of legislative and executive functions. . 420–421

7. The harmony it maintains between Legislature and Executive is a great advantage, but it is realised at the expense of serious drawbacks, especially instability and inexpertness of ministers . . . . . 421–424

8. Simple Constitutional Monarchy affords a means of avoiding these drawbacks; but it vests dangerous powers in an irremovable individual, for whose competence there is no adequate security . . . . 424–428

9. This last danger is avoided by the plan of a Periodical

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Executive, which is exemplified by the "Presidential System" of the United States, but also admits of a non-monarchical organisation. . . . . 428–432

10. The Executive should have some power of practically legislating: but such power should be carefully limited—especially if there are long intervals between parliamentary sessions. The Executive should also have a share in the legislative work of Parliament; and a special control over financial proposals may advantageously be given to it. . . . 432–436

11. The Legislature cannot conveniently be restrained from dealing with particular cases in general legislation; but it should be restrained, by law or custom, from interfering with the selection of individuals for executive work, and from intervening directly with the management of foreign affairs, except in certain cases where the consent of the supreme legislative and money-granting organ seems indispensable. . . 436–440

12. Some precautions are needed to obviate the danger of undue influence, exercised by the executive on members of Parliament; especially the latter should be generally incapable of holding subordinate executive offices. . . . . 440–441

## CHAPTER XXIII

### TWO CHAMBERS AND THEIR FUNCTIONS

1. A second chamber, though not necessary, is useful in checking hasty legislation, impeding combinations of sinister interests, and supplementing the deficiencies of the primary representative assembly . . . 442–445

2. To give the two chambers co-ordinate powers is the simplest plan: but it creates a difficulty as regards financial control, and is generally unsuited to Parliamentary government: it is more suitable where the Supreme Executive holds office for life or for a fixed period . . . . . 445–450

3. A senate designed to be co-ordinate in power with the House of Representatives should be elected, directly or indirectly, by the citizens at large: if its power is more limited, other modes of appointment are suitable. 450–454

4. The functions of the chambers may be specialised in various ways. . . . . 454–456

## CHAPTER XXIV

### THE JUDICIARY AND ITS RELATION TO OTHER ORGANS

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1. The Judiciary should be in the main separate from the Legislature; but (*a*) the Legislature should somehow avail itself of judicial experience; and (*b*) the highest Court cannot well be deprived of the power of making Law to some extent. . . . . 457–460
2. The Judiciary should decide questions of constitutional as well as civil right, including membership of the Legislature; but the latter should be final judge of its own procedure and order . . . . . 460–462
3. For the security of private citizens, it is important that the Judiciary should be as independent of the executive as possible; this should be kept in view in determining the appointment and dismissal of judges. 463–465
4. This is one ground for introducing an unprofessional element into judicial tribunals; but this is also advocated on other grounds. This introduction may take various forms, of which the jury is one. . . 465–468
5. There are strong grounds for some introduction of judges other than professional lawyers, where special experience of affairs is required for right judgment; but, speaking generally, the weight of argument seems against the use of a jury in civil trials; there are, however, special reasons for adopting it in criminal trials. . . . . 468–474
6. There are important differences in the machinery appropriate to civil and criminal cases respectively; especially a public prosecutor is required for the latter; though private prosecutions should also be allowed, unless judicially checked. . . . . 474–478
7. Appeals should generally be allowed on questions of law; it is more doubtful how far they should be allowed on questions of fact. If the power of pardon is used as a substitute in criminal cases, it should not be exercised by the executive alone . . . . 478–479
8. The specialisation of the judiciary is a difficult question; in particular, it is doubtful whether there should be "Administrative Courts" for any disputes of right between government officials and private persons. . 479–482
9. A specially constructed tribunal is also in some cases

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necessary for dealing with official misconduct of which the mischief falls on the public. . . . . 482–485

## CHAPTER XXV

### LOCAL AND SECTIONAL GOVERNMENT

1. Partially independent organs of local government are required to realise the full advantages of representative government; but they involve certain drawbacks and dangers, and the independent power allotted to them requires careful limitation. . . 486–489
2. The division of areas and functions will be determined by various considerations; among which—apart from historical causes—the degree of separation of interests on the one hand, and the value of uniformity and system on the other hand, are most important . . 489–492
3. The division of functions may be illustrated by road-making, sanitary intervention, poor-relief, and the prevention and punishment of crime. . . . 492–496
4. An extensive devolution of legislative powers on local governments has some advantages; but they are outweighed by the attendant drawbacks—at least in the case of a tolerably homogeneous community, of which the parts are in active mutual communication . . 496–500
5. Local Governments should be constructed on the general principles before laid down for the organisation of the central government, but with important differences in their application. . . . . 500–501
6. In some cases governmental powers may properly be entrusted to sections of the community not locally defined; but such cases are exceptional. . . . 501–504

## CHAPTER XXVI

### FEDERAL AND OTHER COMPOSITE STATES

1. If the powers of local Governments are—for historical or other reasons—extended beyond a certain point, the State becomes practically composite; if the component parts are politically co-ordinate and constitutionally separate, it becomes Federal . . . . . 505–507
2. Federality implies a constitutional division of powers between the Governments of the part-states and the Government of the whole, by which a substantial autonomy is secured to the former; and some expression of the separate political existence of the part-states

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in the structure of a federal Government is natural, though not essential. A federal Constitution will tend to be stable; but there should be some legal process of changing it. . . . . 507–512

3. The distinction between a Federal State and a Confederation of States having a common organ of Government may be variously drawn; the consideration here regarded as decisive is whether the common Government does or does not enter into important direct relations with individual citizens. . . . . 512–514

4. Points of peculiar importance in the construction of a Federal Government are (1) the appointment of the organ that decides disputed questions of constitutional interpretation; and (2) the provision of adequate security for the divergent interests of the part-states. This latter presents a specially difficult problem where the parts are few and unequal. . . . . 514–516

5. A Federal Union enables its members to enjoy most of the military and economic advantages of large states, with the minimum sacrifice of local independence and individual freedom; the inconveniences of a federal state are chiefly weakness of internal cohesion and diversity of localised legislation. . . . . 516–519

6. The relation of dominant states to dependencies has usually a partial resemblance to one or other of the forms of federal union, with the fundamental distinction that the members of any dependent part-state have no control over the common Government of the whole. Such dependencies chiefly arise either through (1) Conquest—in which case the form of government will reasonably vary with the amount of coercion required— 519–521

7. or (2) through Colonisation. In this latter case the most expedient relation between mother-country and colony will partly depend on the character and future destiny of the colony; but in any case the Colonial department of the Central Government has a difficult task, and should be very carefully organised. . . 521–525

## CHAPTER XXVII

### THE CONTROL OF THE PEOPLE OVER GOVERNMENT

1. In West-European States generally, the share of the people at large in Government is confined to the election of legislators; it is therefore very important to ascertain precisely the relation which is or ought to

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be thus established between electors and elected. A common view of representative government is, that the "people govern through their representatives." . . 526–529

2. If this view is sound, it would be desirable to give the electorate a more direct and complete control over their representatives than is attempted in any European country except Switzerland; but I think, on the contrary, that it should be the constitutional duty of the elected legislator to act on his own judgment. . 529–533

3. I think, however, that the direct intervention of the citizens at large is desirable in certain special cases; chiefly (1) to settle a disagreement between two legislative chambers, or (2) when changes are required in a rigid constitution, not alterable by the ordinary process of legislation . . . . . 533–535

4. A rigid constitution, if the rigidity be not excessive, is a useful barrier against hasty fundamental changes; but it has some drawbacks — especially the difficulty of finding an unexceptionable organ for deciding constitutional disputes . . . . . 535–540

5. The rules included in such a constitution—under whatever heads they may be classed—should be either of a simple and fundamental character, or based on special reasons for distrusting the judgment of the ordinary legislature. . . . . 540–543

6. Constitutional rules other than structural may be needed to protect the freedom of individuals from legislative encroachment; but it is difficult to make such rules very precise without hampering the legislature unduly. Examples of this class are rules protecting free speech and freedom of the press. . . . . 543–545

## CHAPTER XXVIII

### THE STATE AND VOLUNTARY ASSOCIATIONS

1. Political Government—of the coercive association called the State—is only one species of government. The voluntary associations found in modern political societies have a kind of government, distinguished from political government by its very limited power of inflicting penalties. . . . . 546–548

2. A special danger of obstinate disobedience to Government arises in the case of such associations, when their aims conflict with those of Government, through the consciousness of strength which association gives; this

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danger may constitute an adequate ground for special repressive intervention. Similar reasons for special intervention are applicable in the case of political meetings. . . . . 548–551

3. Moral coercion—by acts not illegal apart from their coercive purpose—may be exercised by such an association to an extent gravely mischievous; but it is difficult to lay down a legal rule that will effectively prevent the mischief, without too severely restricting freedom. This applies especially to industrial associations; which may also be economically mischievous to the community as a whole, through monopoly . . . 551–557

4. Churches perform a function useful to the State, which seems likely to be better performed if they are kept independent of the State. How far the danger of conflict between Church and State justifies a permanent interference of Government to avert it is a more difficult question,—the right answer to which seems to vary with circumstances . . . . . 557–559

5. If special control over Churches is required, a comparatively unobjectionable mode of exercising it is by granting certain religious associations certain minor privileges and indirect endowments, which they would be afraid of losing in case of conflict. If the Church possesses funds derived from private sources, a more drastic kind of interference will be easy in case of conflict,—and may be expedient even apart from conflict . . . . . 559–562

## CHAPTER XXIX

### PARTIES AND PARTY GOVERNMENT

1. The natural division into parties for political purposes would seem to be multiple, not dual; whether the parties are based on similarity of convictions or on community of interests. . . . . 563–567

2. The decisive impulse towards a permanently dual organisation of parties appears to be given by the desire to carry elections,—especially elections in which the Supreme Executive is directly or indirectly appointed . . . . . 567–569

3. The dual party system tends to diminish the instability that attaches to Parliamentary Government, and to render the criticism of governmental measures more orderly and circumspect; but it tends to make party-

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spirit more comprehensive and absorbing, party-criticism more systematically factious, and the utterances of ordinary politicians more habitually disingenuous. It also aggravates the defects of representative government in other ways . . . . . 569–574

4. Certain remedies, partly political partly moral, may be suggested for these evils ; the former will vary with the precise form of government adopted . . . . 574–577

## CHAPTER XXX

### CLASSIFICATION OF GOVERNMENTS

1. The current classification of forms of government is originally derived from the results of Greek political experience ; but the modern use of the leading terms is materially different from the Aristotelian use . . 578–582

2. We may distinguish two different conceptions of the fundamental principle of democracy. The first is expressed in the proposition "that Government should rest on the active consent of the majority of the citizens." This is not, however, understood to imply that this majority should have the right to interfere authoritatively in any and every governmental decision. . . 582–587

3. Hence the principle of democracy, as above conceived, may be accepted without accepting the further proposition "that any honest and self-supporting citizen is as well qualified as any other for the work of government." Its acceptance is therefore compatible with a full admission of the need of specially qualified persons for the greater part of the work of Government. . . 587–590

4. In fact the representative system combines the principle of aristocracy with that of democracy ; it also tends to have a useful element of oligarchy, if the representatives are unpaid . . . . . 590–593

5. The principle of monarchy is also to an important extent reconcilable with that of democracy . . . . 593–596

## CHAPTER XXXI

### SOVEREIGNTY AND ORDER

1. The question where Sovereignty or Supreme Political Power resides in a State cannot be satisfactorily answered without a careful definition of Political

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Power. Political power, in an orderly society, is exercised by or through some organ of government; it is the power exercised in such a society by persons whose directions to other members of the society will be enforced, if necessary, by physical violence—though the fear of this violence is not the sole motive producing obedience to such directions . . . . 597–599

2. The power exercised by any individual or body of persons on an organ of government is not strictly political power, unless the former is able to withdraw or diminish the governmental power of the latter. . . 599–602

3. It is doubtful how far a body that can dismiss an organ of government is to be regarded as its political superior (1) if it can only dismiss at certain periodic intervals, or (2) if it is not completely capable of corporate action. 602–604

4. In a certain sense it is true that the mass of the people in any country is the ultimate depository of political power. But in other than democratic states this power is unconsciously possessed, unexercised, and largely unfeared. Still the wishes of the community impose some limits on governmental power, even in undemocratic communities, through the fear of disorder; and, for a similar reason, leaders of opinion outside Government have a share of political power. . . 604–607

5. If we ask where supreme political power rests in a State with a given governmental structure, we must extend further the assumption that it is "orderly"; we must take "order" to include performance of the assigned functions, on the part of the different organs of Government . . . . . 607–611

6. The actual complexity in the distribution of political power will be further illustrated by considering the question "where supreme political power resides," in relation to the chief forms of Government distinguished and discussed in previous chapters . . . . . 611–616

7. The effective physical force of different sections of the community is by no means proportioned to their numbers. A standing army of professional soldiers is therefore a source of danger to a State. . . . 616–618

8. A moral right of insurrection, as an ultimate resource against misgovernment, must be admitted in a democratic community, no less than under other forms of government . . . . . 618–623

# CHAPTER I

## SCOPE AND METHOD OF POLITICS

§ 1. On moral questions, in our age and country, most persons are accustomed from comparatively early years to pronounce confident decisions; sometimes arrived at intuitively, or at least without conscious processes of reasoning, sometimes the result of rational processes of more or less length. The citizens of a free country—at least above a certain low stage of intellectual development—are similarly accustomed to decide unhesitatingly many, if not all, of the political questions which the course of their national life brings before them: but in this case, to a greater extent than in the former, the decisions are arrived at as the result of conscious reasoning from certain general principles or assumptions. Now the primary aim of the Political Theory that is here to be expounded is not to supply any entirely new method of obtaining reasoned answers to political questions; but rather, by careful reflection, to introduce greater clearness and consistency into the kind of thought and reasoning with which we are all more or less familiar. In order to arrive at sound conclusions on practical questions—I do not mean *infallible* conclusions, but conclusions as free from error as human beings, in the present stage of their development, can hope to reach—much detailed knowledge is needed which the general theory of politics cannot profess to give: it can only point out the nature of this further knowledge, and the sources from which it is to be obtained. The general

theory of politics ought to classify the considerations by which any given political question should be decided, and indicate their general bearing on the question: but the degree of weight to be attached to each species of considerations in any particular case has mostly to be learnt from experience: so that the main practical use of the theory is to show how experience is to be interrogated. Still, clearness and precision in our general political conceptions, definiteness and consistency in our fundamental assumptions and methods of reasoning, though they do not constitute anything like a complete protection against erroneous practical conclusions, are yet, I believe, of considerable practical value; and the systematic effort to acquire them deserves an important place in the intellectual training of a thoroughly educated man and citizen.

We may appropriately begin by trying to attain clearness and precision in our general conception of the subject investigated. In the first place, it seems to me convenient and in accordance with usage to draw a distinction,—which is sometimes overlooked,—between "Politics" and the "Social Science," or, as it is now most commonly called, Sociology. I take the former study as having a narrower scope than the latter: Sociology, as I conceive it, deals with human societies generally; Politics with political or governed societies regarded as possessing government. The difference between the two subjects is not indeed great, if we merely consider the number of human beings included in either case; since the vast majority of mankind are, and have been in historical times, members of political or governed societies. Still, we know of inferior races who only exhibit this characteristic doubtfully and imperfectly: as Mr. Spencer points out (*Princ. of Soc.*, § 228), "groups of Esquimaux, of Australians, of Bushmen, of Fuegians, are without even that primary contrast of parts implied by settled chieftainship. Their members are subject to no control but such as is temporarily acquired by the stronger, or more cunning, or more experienced." Such groups, therefore, lack what we now regard as an essential characteristic of political society,

though they can hardly be excluded from the range of "Sociology" or the "Social Science."[1]

But we are more concerned to note that the members even of societies that have settled governments have relations to each other of the greatest importance, which, though they could hardly be maintained without government, are still, in the main, not determined by it: and, accordingly, in those branches of social science which are primarily concerned with these other relations, the fact of government drops properly into the background. Consider, for instance, the industrial or professional system of modern communities, by which men are distinguished from and related to each other as physicians, teachers, masons, carpenters, etc. This vast system of relations, with all the minutely subdivided organisation of labour which it involves, has been in the main constructed without the direct action of government: though, no doubt, it could not be maintained without the enforcement, through governmental agency, of rights of property, contracts, etc.; and though it has been importantly modified—to a varying extent in different ages and countries—by direct governmental interference. Accordingly, it has been possible for the followers of Adam Smith to separate the study of the industrial organisation of society—under the name of "Political Economy"[2]—almost entirely from the study of its political organisation: and this separation I should in the main adopt, though I think it is liable to be carried too far. We have also to note—what is sometimes over-

[1] Even in the case of superior races, in a primitive condition, it is often difficult to find anything that can be properly called government—except during war. Thus Burckhardt (*Notes on the Bedouins*, i. pp. 115-6) tells us that though "every Arab tribe has its chief sheikh, and every camp is headed by a sheikh or at least by an Arab of some consideration," still "the sheikh has no actual authority over individuals . . . his commands would be treated with contempt, but deference" may be "paid to his advice."

[2] In my *Principles of Political Economy* (Introduction, ch. ii. § 2) I have pointed out that the term "Political Economy" was originally used to denote an *art* rather than a *science*—the theory of right governmental management of national industry, and not the theory of the manner in which industry tends to organise itself independently of governmental interference.

looked by writers who lay stress on the analogy between the organism of an individual man (or other animal) and the "social organism"—that human beings, considered in respect of their industrial or economic relations, fall into groups differing widely both in extent and in sharpness of definition from the groups into which they are combined by their political relations. Thus most of the citizens of any European community have, through foreign trade, economic relations of more or less importance with the members of some other communities: and not a few of them have a closer economic connection with some foreigners than they have with most of their fellow-citizens.

I might further illustrate the foregoing remarks by referring to other relations of various kinds, by which civilised men, in the present age, are socially connected into groups not coinciding with either of those just discussed. Some of these groups — religious societies being the most important example — have a kind of government, and may therefore be called *quasi-political;* though, as they exist in modern states generally, they differ importantly from political societies in the strictest sense,—the most important difference being that the government of such a quasi-political group cannot inflict on its members any (mundane) penalty more formidable than exclusion from membership. There are other groups again—for example, those constituted by the possession of a common language and literature—which have, as such, no government at all. But I have said enough to show that the fact of government is only a part, though a very important part, of the whole fact of social organisation; and to make clear the distinction I wish to draw between "Social Science" or "Sociology," which treats of human society generally, and "Politics," which treats of political societies regarded in their political aspect.

§ 2. The question, however, still remains how far Politics can be properly or advantageously separated from the general science of society. To this question J. S. Mill (*Logic*, B. VI. ch. ix. § 4) appears to give a decidedly negative answer.

He says that there can be no separate science of government; government being the fact which of all others is most mixed up, both as cause and effect, with the qualities of the particular people or of the particular age. He holds, accordingly, that the science of government cannot be properly separated from what he calls "Political Ethology, or the theory of the causes which determine the type of character belonging to a people or to an age." Since, therefore, in treating of the phenomena of government we have to take account of "all the circumstances by which the qualities of the people are influenced," Mill concludes that "all questions respecting the tendencies of forms of government must stand part of the general science of society, not of any separate branch of it." Of this general science, as he afterwards explains (ch. x. § 2), "the fundamental problem is to find the laws according to which any state of society produces the state which succeeds it and takes its place." And the solution of this problem, as he goes on to explain, can only be advantageously attempted by a method primarily historical: we must obtain from history empirical laws of social development, and afterwards endeavour to connect these, by a process which he calls "inverse deduction," with "the psychological and ethological laws which govern the action of circumstances on men and of men on circumstances." In Mill's view, in short, Theoretical Politics can only be scientifically studied as one part or application of the Philosophy of History.

Now, I agree with Mill in holding that the scientific study of the different kinds of governments that have actually existed in human society ought to be pursued in close connection with the scientific study of other important elements of the societies in question: whether the aim of the student is to ascertain the causal relations of the differences in such governments or to compare their effects on the happiness of the societies governed. I think, however, that the development of Government or of the State is one thread or strand of human history which may usefully be separated from other components of the complex fact of social develop-

ment to a greater extent than Mill holds to be possible. I think that in the division of intellectual labour which the growth of our knowledge renders necessary, this separation of Political History is almost unavoidable: though I quite admit that it ought never to be carried so far as to make us forget the influence exercised on government by other social changes—for instance, by the development of thought, of knowledge, of morals, of industry.

But it would be out of place to discuss this question further here: since in any case I do not think that any results attained by the study of the history of political societies can be directly or decisively applied to answer the questions with which we are here primarily concerned.

I explained at the outset that the primary aim of these lectures is to set forth in a systematic manner the general notions and principles which we use in ordinary political reasonings. Now, ordinary political reasonings have some practical aim in view: to determine whether either the *constitution* or the *action* of government ought to be modified in a certain proposed manner. Hence the primary aim of our study must be similarly practical: we must endeavour to determine what *ought* to be, so far as it depends on the constitution and action of government, as distinct from what is or has been. And in the systematic reasonings by which we seek to arrive at such practical conclusions I conceive that the historical study of the forms and functions of government can only occupy a secondary place.

This is not so much on account of the inevitable defects of the study of human history—the difficulty of ascertaining past events with sufficient fulness and accuracy to enable us to establish trustworthy generalisations as to their causal relations: it is rather owing to the very characteristic which gives the history of civilised mankind its special interest for the philosopher—viz. that it is concerned with that part of the knowable universe in which change most distinctly takes the form of progress: so that each age has its own problems, in the solution of which we can only obtain a doubtful and indirect assistance from a study of preceding ages. Grant

that History scientifically treated may enable us to decide, at least roughly and approximately, how far particular laws and institutions have tended to promote human happiness or social wellbeing in past ages; we cannot hence legitimately infer, in any direct and cogent way, what structure or mode of action of government is likely to be most conducive to happiness here and now. This, indeed, the advocates of what is called the "historical method" have usually maintained with especial emphasis: they have been especially anxious to urge that the value of all political institutions is "relative," and that those best adapted to promote social wellbeing in any given age and country may be in the highest degree unsuited to different circumstances and a different stage in the development of human society. It may be said, however, that a science of history, if deserving of the name, must enable us to predict; that if we have ascertained the true laws of development of political societies, we shall know what government is to be and do in the future, no less than what it has been and done in the past. But even granting—what would be very difficult to establish by any "consensus of experts"—that our study of history has actually attained to this extent a scientific character, it appears to me that any guidance that may be derived from such scientific forecasts for the problems of practical politics must be merely negative and limitative, and cannot amount to positive direction. It may be most useful in preventing us from wasting our efforts in the attempt to realise impracticable ideals: it may lay down for us certain lines within which our choice of governmental institutions and laws is necessarily restricted: but it cannot, I conceive, instruct us how to choose within these lines. For instance, we might conceivably know in this way that in the course of one or two centuries all nations now civilised will have adopted some form of democracy: this would render it useless to inquire what kind of aristocracy would be best adapted for any of these nations, but would in no way assist us in determining the particular form of democracy most likely to be conducive to its wellbeing. Grant that we

know all that the most confident of scientific historians would claim to know of the irresistible tendencies of social and political development; the question still remains, What, within the limits set by these tendencies, is the best mode of organising government and directing its action? And the more we believe in a law of development tending to make the future specifically unlike the past, the less direct assistance can be expected from our knowledge of what the structure and functions of government have been, in determining what they ought to be.

§ 3. I conclude, then, that in framing the precepts or maxims of Practical Politics, induction from the political experiences which history records can only be employed in a secondary way, as a useful and important, though necessarily imperfect, test of the results otherwise obtained.[1] But if this be so, by what other rational method can we deal with the questions of Practical Politics? According to my view it must be a method mainly deductive: we must assume certain general characteristics of man and his circumstances, — characteristics belonging not to mankind universally, but to civilised man in the most advanced stage of his development: and we must consider what laws and institutions are likely to conduce most to the wellbeing of an aggregate of such beings living in social relations. According to this method, Politics is not based primarily upon History but on Psychology: the fundamental assumptions in our political reasonings consist of certain propositions as to human motives and tendencies, which are derived primarily from the ordinary experience of civilised life, though they find adequate confirmation in the facts of the

[1] Such, I may observe, is the method actually employed, not only by Bentham and James Mill, but even by J. S. Mill in his treatise on *Representative Government*—notwithstanding the views expressed in his *Logic of the Moral Sciences* to which I have above referred. I have no right to suggest that Mill had consciously abandoned the general conception of the relation of Politics to History which we find in his *Logic*: but when he came to treat with a view to practical conclusions the question of the best form of Government, he certainly dealt with it by a method not primarily historical: a method in which history seems to be only used either to confirm practical conclusions otherwise arrived at, or to suggest the limits of their applicability.

current and recent history of our own and other civilised countries. These propositions, it should be observed, are not put forward as *exactly* or *universally* true, even of contemporary civilised man; but only as sufficiently near the truth for practical purposes. As instances of these fundamental assumptions, I may give what Bentham[1] calls the "pathological propositions upon which the good of Equality is founded," viz. that *caeteris paribus* "each portion of wealth has as corresponding to it a portion"—or rather a "certain chance"—of happiness: that "of two individuals, with equal fortunes, he that has the most wealth has the greatest chance of happiness"; but that "the excess in happiness of the richer will not be so great as the excess of his wealth." Of these propositions the last, as Bentham says, is not likely to be disputed: but the first two, if universally stated, any one with any wide experience of human beings will probably be disposed to contradict: it is easy to find both persons to whom it has manifestly been a misfortune to have been made suddenly richer, and persons who have not appreciably lost happiness by having become suddenly poorer. But it remains true that an overwhelming majority of the most sensible and reasonable persons whom we know would always prefer *caeteris paribus* a larger income to a smaller, both for themselves and for those whom they desire to benefit, and all that Bentham is concerned to maintain—all that he requires to assume for the establishment of general rules of legislation—is that this great majority of sensible persons would be right in the great majority of cases.

As another of these fundamental assumptions, let us take a proposition of J. S. Mill's,[2] viz. that "each person is the only safe guardian of his own rights and interests." This proposition, of course, is only intended by Mill to apply to sane adults—and, to avoid controversy, I will for the present suppose (what, I hardly need say, is not Mill's view) that it is only applicable to adult males: since it is not clear that the common sense of mankind considers women generally to

[1] *Principles of the Civil Code*, ch. vi.
[2] *Representative Government*, ch. iii.

be the safest guardians of their own pecuniary interests. Even among male adults it is not difficult to find instances of persons not insane, who are so recklessly passionate or self-indulgent, or so easily deluded, that a wise parent or friend would prefer to place any gift or bequest intended for their benefit in the hands of trustees. Still it remains broadly and generally true that this proposition is, as Mill says, an "elementary maxim of prudence" on which men commonly act without hesitation in their private affairs: and it is primarily on this ground of common experience that he maintains the validity of this maxim as a principle for the construction of the "ideally best polity;" though he appeals for confirmation to the specifically *political* experience which the history of oppressed classes in different ages and countries abundantly furnishes.

These and other fundamental assumptions of deductive politics we shall have to discuss more fully in subsequent chapters: in which I shall consider carefully the limitations and exceptions to which they ought to be taken as subject. Here I will only say, that while it is a grave and not uncommon error to treat generalisations as to human conduct which are only approximately true as if they were universally and absolutely true, it is a no less serious mistake —and perhaps it is at the present time the more prevalent and dangerous mistake—to throw a rule aside as valueless, or treat it as having only a vague and indefinite validity, because we find it subject to important limitations and exceptions. Whereas the truth is, that in most cases our knowledge, in any real and important sense, of a general truth relating to human action and its motives and effects, develops *pari passu* with our knowledge of its limitations and exceptions: until we have a definite and clear apprehension of the latter, we cannot have a firm grasp of the former. This will, I think, be abundantly illustrated in the exposition of political principles that follows: I have said enough for the present to illustrate the general nature, and to give a *prima facie* justification, of the deductive method which I shall be mainly engaged in developing.

For myself, while I regard this method as useful and even indispensable, I quite admit the importance of bearing constantly in mind its inevitable limitations and imperfections. It must never be forgotten that no particular nation is composed of individuals having only the few simple and general characteristics which are all we can include in our conception of the civilised man to whom our abstract political reasoning relates. An actual nation consists of persons of whom the predominant number have, besides the general characteristics just mentioned, a certain vaguely defined complex of particular characteristics which we call the "national character" of Englishmen, Frenchmen, etc.; among which sentiments and habits of thought and action, formed by the previous history of the nation, must always occupy a prominent place: and a consideration of these particular characteristics may modify to an indefinite extent the conclusions arrived at by general deductive reasoning. Thus I may conclude, from the point of view of abstract theory, that by taking twelve plain men and shutting them up in a room till they are unanimous, I am likely to get but a blunt and clumsy instrument for the administration of criminal justice: but this defect may be more than compensated by the peculiar confidence placed in this instrument by a people whom the unbroken tradition of centuries has taught to regard trial by jury as the "palladium of its liberties." So again, no one constructing a legislative organ, composed of two chambers, for a newly-founded community of modern civilised men, would propose that membership of the second or revising chamber should be handed down from father to son, like a piece of private property: but, in a country that has long been led by a hereditary aristocracy, a chamber so appointed may have a valuable power of resistance to dangerous popular impulses which it may be difficult to obtain by any other mode of appointment.

These are questions which we shall afterwards have to discuss: I only refer to them now by way of illustration; and in order to warn the reader that, in my opinion, no questions of this kind—regarded as practical problems presented for

solution to a particular nation at a particular time—can be absolutely and finally determined by the general deductive method which I shall try to work out in subsequent chapters. At the same time this general treatment of the subject cannot fail, in my opinion, to be useful, provided that we are not misled into regarding it as complete and final: useful, not merely as a preparatory exercise, but because considerations of the general kind with which we shall be concerned must always form an important part of the discussion of any question of practical politics, though they have to be combined with—and to a varying extent overruled by—considerations of a more special kind. Indeed the least reflection will show that in ordinary political discussions reference is continually made to propositions laid down as true of civilised man generally, not merely of the English species of civilised man. Why is strong resistance made to legislation interfering with freedom of contract? Because it is thought that *men in general* are likely to know their own interest better than any government can know it for them; or that they are likely to gain more in vigour of intellect and character by being left to manage their own affairs than they are likely to lose materially through foolish contracts. Why is it proposed to increase the number of peasant proprietors? Because it is thought that men in general will labour more energetically if they receive the whole advantage resulting from their labour. And, similarly, in other cases of current interest.

§ 4. The study of Politics, then, as I shall treat it, is concerned primarily with constructing on the basis of certain psychological premises the system of relations which ought to be established among the persons governing, and between them and the governed, in a society composed of civilised men, as we know them—of civilised men, we may say, in the last stage which has as yet been reached in the progress of civilisation. It has two main divisions, (1) one relating to the Functions of Government, and (2) the other to its Structure or Constitution; but it also includes—as an important though less extensive division—an inquiry into

the relations that ought to exist between government and governed, besides such relations as are already defined in the determination of governmental functions. This last inquiry I have thought it most convenient to take after concluding the two first-mentioned divisions of the subject. Of these two main divisions, the first, in logical order of discussion, ought clearly to precede the second: in investigating the best constitution we are considering the fitness of Government as an instrument to do a particular work: and in such a consideration we obviously ought to get as clear an idea as possible of the work that has to be done before we proceed to consider how the instrument ought to be constituted. Let us begin, then, by considering the Functions of Government. Here, again, an obvious distinction suggests itself between Internal and External Functions—*i.e.* between the regulation of the action of government on the members of the community governed, and the management of its relations to other communities and individuals. Of these the former will naturally occupy our attention first, as being more essentially implied in our general notion of political society; since we can conceive—indeed many have looked forward to—the union of the human race under one "parliament of man"; or, again, we can conceive a political society so much separated from others by physical barriers as to have no important external relations.

Of the Internal Functions of Government the establishment and administration of Law is admittedly the most important: and to this accordingly our attention will be first directed. But before we proceed to the consideration of what Law and Government ought to be, it is desirable to undertake a preliminary inquiry into the characteristics that are essentially implied in the commonly received notions of Government and Law. To this we will proceed in the next chapter.

## CHAPTER II

### THE FUNDAMENTAL CONCEPTIONS OF POLITICS

§ 1. An eminent writer,[1] who treats of the "Logic of Politics," distinguishes a "preliminary branch" of the science of Politics, which he regards as an essential preparation for a practical no less than for a purely theoretical study of the subject, though it does not itself include an answer to any practical questions. This preliminary study, he explains, deals with the structure and functions of government not as they ought to be but as they must be; that is, it teaches what is essentially involved in the idea of political government, and explains the necessary instruments and methods of government—laws and their sanctions, executive commands and judicial decisions, the establishment of rights and obligations, etc. Its aim is to make clear by discussion and definition these and other general notions that enter into our complex conception of political society; but it does not inquire into the operation and tendency of any particular kinds of laws or executive commands, or of any particular organisation of the judicature or any other governmental institutions; nor does it urge the preference of any one law or institution to any other. "It explains the meaning of monarchy, aristocracy, democracy, but does not teach which is the best form. It shows what is the nature of punishment, but does not say which punishments are the most efficacious. It explains the nature of a dependency, without arguing the question—should colonies have a separate government?"

[1] Mr. Bain, in his Logic; *Induction*, ch. viii.

I agree with Mr. Bain in recognising the value of the study thus marked off as preliminary.[1] To obtain clear and precise definitions of leading terms is an important, and not altogether easy, achievement in all departments of scientific inquiry: but it is specially important in our present subject. But in most cases it seems to me most convenient, in such a treatise as the present, not to separate our discussion of the meaning of essential terms from our discussion of the practical questions in which the terms are used. I therefore propose, generally, to examine what is essentially involved in the terms "property," "contract," "executive" and "legislative" organs and functions, etc., at the same time as I inquire what rights of property and contract should be maintained in a well-ordered society, and how the organs for exercising executive and legislative function should be constituted. But a preliminary discussion of the fundamental conceptions Government, Law, Right, Obligation, is, I think, expedient before we discuss the general principles on which Government ought to act, lay down laws, distribute rights and obligations. As regards the two first of these fundamental conceptions, Government and Law, the view held (I believe) by the majority of instructed persons in England at the present day—is derived in the main from Austin. I propose, therefore, to take, as the basis for our discussion, a brief summary of Austin's account of Law and Government.

### *Summary of Austin's Formal Politics.*

1. Law, in the sense in which we are now concerned with it—the law that it is the main internal function of Government to maintain and enforce, and to modify in detail, from time to time, so far as modification may be required—is only one species of what may be properly

[1] This preliminary branch, if worked out in complete separation from the practical inquiries from which Mr. Bain distinguishes it, might be called "Formal" as contrasted with "Material" Politics; it would include, as a portion, the study of general jurisprudence, as now commonly distinguished from the theory of legislation.

called "law"; it is distinguished by Austin as "Positive Law."

2. A Law, in the more general sense, may be defined as a command to do or abstain from doing a certain class of acts, issued by a determinate person or body of persons acting as a body, and involving the announcement, express or tacit, of a penalty to be inflicted on any persons who may disobey the command: it being assumed that the individual or body announcing the penalty has the power and purpose of inflicting it.

3. Such commands when issued directly or indirectly by the Sovereign of the community to which the command is addressed, are Positive Laws, or Laws in the strictest sense.

4. Besides Positive Laws there are other important kinds of commands, relating to classes of actions, to which the term "law" might properly be applied, according to the general definition above given. Thus it might be applied—as it often is—to morality, regarded as the expression of God's will: since obviously all who recognise a Moral Governor of the world must regard what they hold to be the *true* moral code as the "Law of God." This code, however, must be carefully distinguished from what Austin calls "Positive Morality," *i.e.* the body of moral rules supported by the public opinion of a given community at a given time: since positive morality, though it resembles law in certain important points, differs in others no less important. In the case of both positive morality and positive law we find (1) a wish felt by human beings that other human beings should act (or not act) in a certain way, and (2) some penalty to be expected if the wish is not realised, which (3) causes a general conformity to it. But in the case of Positive Morality the wish is not expressed nor the penalty announced by a *determinate* body of persons, and the person or persons who will enforce the penalty cannot be known beforehand.[1]

[1] Other kinds of commands that, in Austin's view, might properly be called Laws, are (*a*) commands issued by one supreme government to another,

5. Confining ourselves now to Positive Law,—or law laid down directly or indirectly by the Sovereign,—we see that to get our conception of it clear we require to define "Sovereign."

The Sovereign in any community is that determinate person, or aggregate of persons combined in a certain manner, whom the bulk of the community habitually obey, provided that he or it does not habitually obey any one else: hence, it is implied, the community that has a sovereign, strictly speaking, is independent.

6. From this definition two important consequences follow:—

(*a*) That sovereignty cannot, strictly speaking, be legally divided between two or more persons or bodies of persons, acting separately: because any such persons or bodies must have, *ex hypothesi*, powers legally limited in certain directions —there are certain things which each of them is by law prevented from doing: but, if so, they are in habitual obedience to the authority that laid down the law, and it is this latter that is the real Sovereign.

*E.g.* in a federal state, such as the United States of America, sovereignty, strictly speaking, does not belong to the central government nor to the separate governments of the federated states; but to the body, whatever it may be, that is recognised as having authority to alter the conditions of federation.

(*b*) The power of the Sovereign cannot be legally limited —for, obviously, the Sovereign cannot be coerced to act in a certain way by any penalty threatened to be inflicted by the

and (*b*) commands issued by individuals recognising no political superior; or by private persons or societies within a governed community, if issued "not in pursuance of legal rights." This latter phrase, however, has a certain ambiguity. It might be said that the rules of a club were issued in pursuance of legal rights; since the club has a legal right to impose rules on its members under penalty of expulsion, if such rules are in accordance with the constitution of the club as known to and accepted by such members when they joined it. This ambiguity might perhaps be removed by saying "*special* legal rights."

Sovereign! Hence "Constitutional Law"—so called—is properly to be regarded as a branch of Positive Morality, so far as it relates to the actions of the Sovereign.

§ 2. In order that, before criticising this view of the relation of Law to Government, we may appreciate its main purpose and drift as thoroughly as possible, it will be desirable to have before our minds an example of the confusion of thought (as it seemed to them) which Bentham and Austin found in the received exposition of English Law, and which it was their special aim to dispel. We find that Blackstone, while defining Law as "a rule of civil conduct prescribed by the supreme power in a state," still recognises a "Law of Nature" which claims our obedience without being so prescribed, and is indeed "superior in obligation to any other" law. In virtue of this Law of Nature, Blackstone declares, men have "natural rights, such as life and liberty," which "receive no additional strength when declared by the municipal laws to be inviolable"; which "no human legislature has power to abridge or destroy, unless the owner shall himself commit some act that amounts to a forfeiture." Such language was by no means peculiar to Blackstone; a doctrine of this kind was prevalent among jurists of the eighteenth century, and its influence was still strong when Austin wrote. To Bentham and Austin it seemed to contain a grave and dangerous confusion between (1) Law as it is, here and now, in any given community, and (2) Law as it ought to be, the ideal by which Positive Law ought to be judged and, if possible, rectified. Such an ideal must of course coincide with or be based upon "those eternal and immutable laws of good and evil, to which the Creator himself conforms, and which he has enabled human reason to discover,"—which Blackstone calls "Law of Nature,"—so far as any such eternal principles are held to be discoverable. But it would be a serious error for any individual Englishman to suppose that this ideal, as conceived by him, was actually established as law in England at the present day, in the sense in which Acts of Parliament are established; and any language which en-

courages a man to claim, as valid here and now, rights not secured by the actually established law of his country, is dangerously revolutionary. When, however, we have thus clearly separated the notions of Actual and Ideal Law, what criterion can we give for determining the former? It was the aim of Bentham and Austin to answer this question by pointing to some definite empirically ascertainable fact. As to the "immutable principles of right and wrong" theorists have continually disputed; there are innumerable schools and sects, and we should be badly off if our rights of personal security, property, etc., had to remain indeterminate until the disputants had convinced each other. But fortunately the law by which as citizens we have to guide our actions may be known without entering into any such theories: viz. simply by asking what has actually been commanded directly or indirectly by the person or persons in our community whom we and the bulk of the community habitually obey.

And this view of the relation of law to government does, I conceive, correspond fairly well to the facts existing in such a community as England is at the present day—so far, at least, as the law is concerned, that determines the legal rights and obligations of private individuals as such: which I propose to call "civil" as distinct from "constitutional" law. The great bulk of Englishmen habitually obey the general directions as to their external conduct that are contained in Acts of Parliament: and though an important part of the laws maintained in force by the decisions of our judges is not derived from Acts of Parliament, still, the interference of Parliament by new statutes has long been so active in all departments of our law, that we may, without a very violent fiction, regard it as approving of whatever it does not abrogate or modify: and we incur at least no practically important error in saying, that any new laws that it chose to lay down would be unquestionably adopted by our law-courts as the basis of judicial decisions. But if we regard Austin's theory as intended to apply to the relation of what has been commonly

recognised as Law to Government in human societies always and everywhere, it certainly cannot be accepted. In arguing this it is not necessary to take into account states of society in which, as Maine points out,[1] the social order is maintained by customary rules, to which obedience is secured by forces other than political: *i.e.* by "partly opinion, partly superstition, but to a far greater extent an instinct almost as blind and unconscious as that which produces some of the movements of our bodies." Even if we only consider communities, in which the "law of the land" is administered by judges whose penalties constitute the most effective motive to its observance, it still does not follow that such law is generally conceived as a body of rules depending for its force on the approval of the supreme legislature. Thus at an earlier period of our own history law was to an important extent conceived both by governors and governed as a subject of science, capable of being learnt by special study, but not capable of being altered by the mere arbitrary will of government, any more than the principles or conclusions of mathematics.

During such periods in the history of progressive communities important changes are continually taking place in law: but they are not mainly introduced in the way of conscious legislation, but by the decisions of judges either (1) professing to interpret pre-existing rules of law but really modifying them in order to adapt them to new circumstances, or (2) overruling them in conformity to a higher law as apprehended by the conscience of an enlightened and equitable judge. And I cannot admit that, as Austin and his followers contend, we may even in such periods legitimately regard the new elements of law as commands of the Sovereign, because we may fairly suppose the Sovereign to *command* whatever rules he *allows* his subordinates to apply. For (1) such a statement appears to me a misleading fiction, if it is clear that the supreme government was itself under the dominion of the ideas just described, and regarded law as something with which, to a great extent, it was beyond

[1] Maine, *Early History of Institutions*, Lec. xiii. p. 392.

its province to interfere. And (2) even supposing that, in such periods, the supreme government would have been obeyed without a struggle, if it had gone beyond its recognised province and commanded what was contrary to the principles of civil justice generally accepted by judges and legal experts; it still does not follow that such commands could at the time have been regarded as Laws. As Maine aptly reminds us, "the tyrant in a Greek city often satisfied every one of Austin's tests of sovereignty; yet it was part of the accepted definition of a tyrant that he 'subverted the laws,'" whereas the true monarch governed according to law: and this distinction between the tyrant and the true monarch was generally accepted by modern European thought in its earliest stage. But (3) we are not warranted in assuming that *any* commands of the Sovereign would have been obeyed, even by its official subordinates. In what Austin and his followers say of "habitual obedience," it seems often to be tacitly implied that such obedience is unconditional, or at least not definitely limited by generally recognised conditions: but as a matter of fact it has been so limited in European countries during the greater part of their history, and in most important ways. For instance, it is not only a true statement of the political *ideas* prevalent during the Middle Ages, to say that no governing individual or body, from the Emperor downwards, had more than limited powers; it was continually proved by experience to be a true statement of political *facts* also, since attempts made by governing persons to exceed their powers were frequently resisted as illegitimate. And much later than the Middle Ages, in Catholic countries, the power of secular governments to interfere in the departments of civil conduct which the Church claimed to regulate was most effectually limited. It was commonly recognised that the spiritual and temporal power had respectively different spheres, and that each was supreme within its own sphere: and though the boundary between the two spheres was somewhat vague and continually disputed, there seems to have been always a point beyond which any attempted encroachment would

have met with successful resistance,—the ecclesiastical courts would have refused to recognise the validity of the secular law or edict: the bulk of the laity would have supported them in their refusal; and the secular government would have had to give way. But if it be admitted that the obedience of subjects may be actually limited by distinctly recognised conditions, the proposition that the power of the Sovereign is not *legally* limited becomes insignificant: since it does not mean that it is not subject to limitations which even lawyers will recognise, but merely that it is not limited by the Sovereign's own commands—which no one can ever have supposed it to be.

It may be said, however, that in the cases to which I have referred, society was in a partially anarchical and disorderly condition: and that when, in the course of historical development, the stage of political order has been attained, Austin's analysis is found to apply: and that—speaking broadly and allowing (as Austin's phrases do) for the imperfections of all human institutions—this stage of orderliness has now been reached in modern communities generally. And it is certainly true that in most modern communities there is a determinate complex body of persons, called the supreme legislature, whose ordinary function it is to lay down rules intended to control the outward actions of members of the community, to the violation of which some penalty[1] is attached: and that such rules are habitually obeyed by the great majority of such members,

[1] I agree with critics of Austin in thinking that the conception of "command"—implying announcement of wish, together with power and purpose of punishing its violation—can only be applied in an indirect way, and by a process of inference sometimes rather complicated, to many of the rules that make up the aggregate of civil law. Still I think that Austin's conception is always applicable, if it is interpreted as meaning only that the expectation of some penalty, to result from the action or inaction of Government or its subordinates, constitutes one motive for conforming to the rules that we call "laws," and supplies a broadly distinctive characteristic of such rules: though the penalty (1) may consist only in the enforced payment of damages to a private individual injured by the violation of the rule, or (2) may be merely negative, and consist in the withdrawal from the law-breaker of some governmental protection of his interests to which he would otherwise have been entitled.

while the legislature does not itself habitually receive commands from any other person or body. It cannot, however, be said obedience paid to this organ of government is not limited by definitely recognised conditions, in most modern communities. On the contrary, in the great majority of modern states, such limits are definitely fixed by the established Constitution. Take (*e.g.*) the Constitution of Belgium, which has remained unchanged for fifty years: a Belgian's rights to worship or not worship as he pleases, to start a school or a newspaper, to assemble without arms (if not in the open air), and the very important right of not being deprived of his property without compensation, are guaranteed by the Constitution, and cannot legitimately be impaired by ordinary legislation. The Constitution itself, however, is alterable by a process determined in the Constitution itself, of which the main points are (1) that no constitutional change can be made without a general election intervening between its commencement and its conclusion, so that two successive pairs of chambers must concur in it; and (2) that when the change is finally passed, two-thirds of the members of each chamber must be present, and two-thirds of those present must vote for the change. Now can we say—as Austin must in consistency say—that this complex combination of elected bodies, along with the king, constitutes the real Sovereign, of which the ordinary legislature is only a subordinate with delegated authority? Surely it strains language to say that Belgians "habitually obey" a combination of bodies that has never been summoned to exercise its functions for fifty years; especially since the requirement of a two-thirds majority may render a change constitutionally impossible, even though a majority of the assembly and of the people may desire it. It is evident that in this and similar cases there is an actual organ of government whose commands are habitually obeyed, and a possible organ of government whose power is legally unlimited: but that the two do not coincide, and that the latter may at any given time be incapable of coming into existence at all, owing to the balanced state of opinion. But

further, it is quite conceivable that certain clauses in the Constitution may be formally declared unalterable: in which case a Sovereign, as conceived by Austin, would be impossible.

These considerations suffice, I think, to render the application of the Austinian notion of sovereignty inappropriate in the case of a community where there is a Constitution limiting the ordinary legislature, and only alterable by a process different from that of ordinary legislation. In the case of England the difficulties just explained do not arise: since the ordinary process of legislation is also the process by which the Constitution is changed. We cannot indeed say with truth that there are *no* limits to the authority of Parliament, even in England—but there is no *definite* recognition of these limits in the ordinary political consciousness of English citizens:[1] in endeavouring to ascertain what the law of England is, we never ask what Parliament has authority to do, but only what it has done. But a new difficulty arises in communities like our own, where a representative assembly is an important part of the legislature, as to whether sovereignty is to be attributed to the representative assembly or to the constituencies who choose them. On the one hand, the constituencies certainly cannot make laws—no private Englishman will suffer any legal penalty for disobeying the most unanimous resolution of the constituencies: on the other hand, it may be plausibly maintained that by the power of dismissal when election time comes round they can keep their representatives in "habitual obedience."[2]

These and other difficulties I shall discuss in a subse-

[1] It may be observed that the legal view of the omnipotence of Parliament, now generally accepted, was not completely reached till a comparatively late period of English history: even so late as the eighteenth century we find—not merely in the vague generalities of the writers of law-books, but even in the more particular dicta of judges—the recognition of legal principles limiting the legislative power of Parliament. Thus Holt affirms that "if an Act of Parliament should ordain that the same person should be party and judge, it would be a void Act of Parliament."

[2] Austin's statements on this point appear to me hopelessly confused and inconsistent.

quent chapter; for which also I reserve the question whether the rules regulating the appointment and co-operation of the persons forming the supreme government—what we ordinarily call constitutional law—are properly termed, as Austin terms them, a "department of morality." But this preliminary discussion has seemed necessary to explain why, while I adopt substantially Austin's conception of the relation of Law to Government, as applied to the civil law of a modern political community in its latest stage, I prefer in stating it to avoid the difficulties of Austin's notion of sovereignty. The question "where supreme power ultimately resides" is one that it is most important to ask with regard to any political society: but it is a question that would be answered very differently in the case of different communities having apparently the same form of government, and very differently for the same community at different times, without any change in the form of government: and the discussion of it in the form appropriate to the present work will come more fitly after we have considered in detail the proper constitution of the different organs of government.

In the first part of our inquiry, then, which relates to the functions of government, it will be enough to assume that in the society with which we are concerned there are one or more persons or bodies, which we may call "highest" or "supreme" organs of government, in the sense that they do not habitually obey the commands of any other person or body, in the ordinary discharge of their functions: and that any commands they issue—in the sphere of their proper functions—will be habitually obeyed by the bulk of the community in all matters affecting the private rights and obligations of the members of the community; so that they are able to bring the whole force of the community to crush any openly recalcitrant member. I shall assume that these organs co-operate harmoniously, keeping each to his proper sphere, so that we may habitually speak of them as one Government: and, finally, I shall assume that the Laws with which we are concerned, in our theory of legislation,

are rules, which if they have not actually emanated from the resolutions of the supreme government may at any rate be regarded as having its approval, being maintained by penalties inflicted by its authority. It is the connection of Law with Government on the one hand and Penalty on the other, which appears to me to constitute the most vital part of Austin's view: and to this I adhere—understanding the connection in either case to be taken as normal, and approximately universal in a well-ordered community, not as absolutely universal.[1]

§ 3. In the preceding discussion I have distinguished "civil" from "constitutional" law as the body of rules determining the (legal) rights and obligations of private members of the community as such in their relations to each other. But the terms used in this definition, though current and familiar, require some further explanation in order to make their import as clear as possible.

Let us begin by considering the term "legal obligation." By this we express the relation of a general rule or command, enforced by the authority of government, to the member or members of the community whose civil conduct it is intended to control. The law is conceived as exercising a certain constraint on the will of such person or persons; and it is this constraint that the term "obligation" expresses. A similar constraint is exercised in the case of "moral obligations" by the conscience of the individual who lies under the obligation, and the moral opinion of the community of which he is a member.[2]

It is not quite so easy to see what is meant by the term "legal right";[3] and perhaps the most convenient way of

[1] See Chapter xiii. I may repeat that the word "Penalty" is to be understood in a wide sense, to include negative as well as positive penalties, and "damages" as well as punishment proper.

[2] The distinction—and possible divergence in particulars—between what any individual believes to be moral truth, and the moral opinion of his society, must always be borne in mind.

[3] The difficulty of defining "a right" is increased by the fact that while we recognise in ordinary discourse that there are *moral* as well as *legal rights*, and that the two kinds of rights are not always coincident, we still frequently

making this clear is to examine the relation of Rights to Obligations according to the ordinary use of both terms. A little reflection will show that we cannot conceive Rights of any one individual without corresponding Obligations imposed on others. Thus *A*'s right of property in any material thing necessarily implies obligations imposed on *B*, *C*, *D*, etc., to abstain from interfering with *A*'s use of the thing: similarly any right to services that *A* may have in consequence of a contract implies that the other party to the contract is under an obligation to render the services: so again, if a child has a right to education, some one is under an obligation to educate it. It is not, however, similarly clear that the imposition of Obligations on one or more individuals always involves the granting of Rights to other persons. Consider (*e.g.*) the legal obligation on Englishmen to abstain from suicide, vagrancy, or keeping gambling-houses: there do not appear to be in these cases—as in those just considered—any definite Rights belonging to assignable individuals which are violated if the obligations are not fulfilled. Still, when we reflect on the interest that the community at large has in the observance of the laws in question, it does not seem strained to say that the community has a right to their observance.

Comparing these cases, I arrive at the conclusion that "a right" is really an obligation regarded from a different point of view: *i.e.* regarded in relation to the person to whom the obligation is intended to be useful. In the case of such rights as the right of property, the rule which binds or obliges the members of the community to abstain from interfering with the owner's use of the appropriated thing has at the same time the effect of securing or protecting the owner's freedom of action in respect of the thing in question: and hence some thinkers have conceived a "Right" as being essentially "secured or protected liberty." But there are other cases to which this definition clearly would not apply:

speak of "rights" without clearly distinguishing which of the two we mean. At present I am concerned with legal rights; but the definition that I propose to give may easily be applied, *mutatis mutandis*, to moral rights.

*e.g.* when a child is said to have a "right to education" there is no liberty secured to the child, but merely an obligation imposed on other persons of rendering it certain positive services.[1]

In speaking, then, of "rules determining rights and obligations of private members of the community as such," I mean rules imposing obligations on private persons either in the interest of other individuals or in the interest of the community at large, considered as an aggregate of private individuals. That is, I mean to exclude (*a*) obligations imposed on members of the government in the interest of private persons, and (*b*) obligations imposed on private persons *in the interest*—so to say—of Government: *i.e.* in order to enable Government to perform its work efficiently. The distinction[2] thus drawn enables us to separate the discussion of the work that Government has to do from the discussion of the methods and instruments by which the work should be done. It will be somewhat further developed in the next chapter.

[1] Some writers hold that a legal right implies that the person who is said to have the right must be able to obtain, by a legal process, redress or punishment from any violation of his right. I agree that such redress or punishment must be somehow obtainable—otherwise the rule professing to determine the right would not deserve the name of a law: but it does not seem to me necessary that the individual whose right is violated should himself have the right of suing or prosecuting the violator: it seems to the better to regard this latter as a secondary and additional right, which is ordinarily given for the better security of the first, but may in some cases be withheld. Thus I should say that a destitute pauper had a legal right to relief in England, because the poor-law officials are liable to punishment if they refuse him relief, though the pauper himself cannot sue or prosecute them.

[2] It should be observed that this distinction does not altogether correspond to the generally accepted distinction between Private and Public Law. According to this latter distinction Criminal Law is placed with Constitutional Law under the head of Public Law: but I conceive that, from a political point of view, the prohibitions of certain acts as crimes must be included among the rules determining the rights and obligations of private individuals as such. The allotment of punishment for such acts I regard as one of the methods by which Government accomplishes its primary work of maintaining these rules in force.

## CHAPTER III

### THE GENERAL PRINCIPLES OF LEGISLATION

§ 1. In the preceding chapter we have been concerned with the general definition of Positive Law, or Law in the strict political sense, in which we speak of the "law of the land," which judges and magistrates are appointed to administer and enforce; as distinct from other kinds of recognised rules of conduct,—such as those contained in the moral code, the code of honour, the code of social behaviour,—which are also in a looser sense called moral laws, laws of honour, social laws. Law, in the sense in which we are primarily[1] concerned with it, is a body of rules intended to control the conduct of the governed, which may be regarded as imposed by Government on the governed: since, though they have not actually been laid down by the persons or bodies of persons whose orders are habitually obeyed by the rest of the community, they are liable to be modified by such persons or bodies, and any resistance to them may be expected to be overborne by the force which the habitual obedience of the community places at the disposal of such governing persons or bodies. This general definition of law must of course apply to good and bad laws alike: it is concerned not specially with laws as they ought to be, but as they must be; or, to put it otherwise, it states the characteristics which, in accordance with usage, we agree to consider essential to the right application of the term "law,"

[1] The propriety of the phrase "international law," will be discussed later. See Chapter xvii.

in its special political sense. Hence the discussion of this definition belongs to the study of actual laws as they are and have been, no less than to the study of the principles on which an ideal system of legislation ought to be constructed: it forms, in fact, a region common to the two studies. At the same time, though the definition carefully avoids any implications that the law spoken of is good, right, or just, it does not altogether exclude an ideal element from the conception of law, and of the community to which the law belongs: for it assumes that the orders of government, whether good or bad, are habitually obeyed by the bulk of the community: whereas in many communities at many times the greatest practical difficulty and the most urgent practical need has been not to get the (so-called) government to issue good orders, but to get them generally obeyed when they have been issued. When the commands of persons attempting to govern are widely disobeyed with impunity, though such persons are still by courtesy commonly called a government, still we do not come into serious conflict with common sense by affirming that they do not really govern, and that their impotent commands are not really laws: and it is in the stricter sense of this affirmation that I shall generally use these fundamental terms.

Bearing, then, in mind that the political community we are considering is assumed to be orderly and not anarchical, so that government is able to bring irresistible physical force to crush any open disobedience to law; let us now proceed to consider on what principles laws ought to be established and administered. This, as all would admit, is the principal part of the regular work that a civilised government has to do. Hume indeed asserts, in a well-known essay, that "we are to look upon all the vast apparatus of our government as having ultimately no other object or purpose but the distribution of justice, or, in other words, the support of the twelve judges. Kings and parliaments, fleets and armies, officers of the court and revenue, ambassadors, ministers and privy-councillors, are all subordinate in their end to this

part of administration."[1] There is some exaggeration in this statement;—since (*e.g.*) the objection that a French province has to being conquered and annexed by Germany is not mainly due to a fear of a bad administration of justice by German judges; but more to the national sentiment which makes it desire to remain a part of the French state. Still Hume's view is so far true as to make it proper for us, in considering the work that government has to do, to direct our attention first to the establishment and administration of a good system of Law.

For our present purpose, however, it will be necessary, in the first instance, to take a narrower view of the Law for which we are to lay down principles than that given in my definition. As applied to any actual community, this definition would include an important aggregate of rules which relate to the appointments and duties of persons exercising governmental functions:—including many rules which would not ordinarily be called "laws" although they are perhaps more obviously "commands of government" than some most fundamental laws: such as the rules issued to the subordinate officers of government in (*e.g.*) the Home Office, or any similar departments of the executive. It is obvious that rules of this kind, whether they are to be called laws or not, do not form part of the law that is primarily the subject of our present investigation: for we are considering the establishment and maintenance of Law as a main part of the work which government should be constructed to do: whereas these administrative rules relate to the manner in which the complex instrument for performing governmental work should be constituted and kept in action. The Law then, for determining which we have now to lay down principles, should be conceived as a body of rules intended to control the conduct of private persons, so far as they are *subjects* but not in the narrower sense *servants* of government. Accordingly, in considering the rights that a good system of legislation ought to secure to such persons, I shall for the present omit rights that correspond to obligations imposed not

[1] Hume, *Moral, Political, and Literary Essays*, Part I. Essay V.

on other private persons, but on members of the government itself. It is important to note this, because among what are commonly recognised in free countries—or countries struggling towards freedom—as "fundamental rights of individuals," there are several important cases in which the obligation that constitutes the other aspect of the right is a governmental obligation. Such, for instance, are the right to freedom of speech and of the press, the right to freedom of assembly, free exercise of religion. In any country where these rights are not completely realised, it is through the action of government that they are withheld or impaired: hence it is convenient to distinguish these as *constitutional* rights from the *civil* rights with which we are now primarily concerned. The consideration of these constitutional rights will come more appropriately in the second part of the treatise, in which I shall examine the structure of the different organs of government, and the relations of government to the governed. I will here only observe that the establishment and the maintenance of such rights do not form part of the ordinary work of Government—regarded as a harmonious whole[1]—in the same sense in which the enforcement of legal obligations on private citizens forms part of its work; but only in the negative sense that it is bound not to encroach upon such rights.

There are, however, other governmental duties of a positive kind, which have a closer connection with civil rights, as they are directly required for the effective realisation of the latter: I mean especially the duty of governmental officials—judges, magistrates, policemen, and others—to perform various functions for the prevention or reparation of wrongs to individuals. These will be most appropriately considered in a later chapter of the present book: after we have discussed the primary civil rights, of which the actual

[1] This qualification is indispensable, because—as I shall hereafter explain—I regard it as a normal part of the duty of the Legislative and Judicial organs of government to prevent encroachments by the Executive organ on the constitutional rights of private persons:—the Executive being ordinarily, by the nature of its functions, under the strongest temptation to such encroachments.

or threatened violation gives occasion for the exercise of these preventive or reparative functions of Government. For somewhat similar reasons, I reserve the consideration of the obligations that it is expedient to impose on ordinary members of the community *in the interest*—so to say—of government: *i.e.* in order to enable government to perform its work efficiently,—as, for instance, the general obligation imposed on male adults to assist, when occasion arises, in the repression of crime and the maintenance of order. At present, I wish to concentrate attention on the rules by which the mutual relations of private members of the community —as contrasted with their relations to the government— should be determined, so far as these rules require the aid of governmental force to secure their adequate observance.

But again, when we examine those rights of private individuals that correspond to obligations imposed on other private persons, we find that one class of these also only come into operation in consequence of the violation of other rights; such as the right to compensation for injury wilfully or carelessly inflicted, and the right of repelling violence by violence. Such remedial rights are obviously to be regarded as secondary and subordinate to the antecedent rights, the violation of which renders them necessary: they only come into operation because law is imperfectly obeyed—or perhaps in some cases imperfectly defined. The rights which we may distinguish as primary, and which we should begin by determining, are rights which would be established and operative if the law was perfectly defined and perfectly obeyed.

§ 2. What then are the principles on which the laws defining the primary civil rights of private members of a civilised community should be constructed, or the criteria by which the goodness or badness of any actual body of such laws should be tested? In answering this question, I do not seek, as I said in my first chapter, to propound and establish any new principles, not recognised in ordinary political thought and discussion; my aim is merely to render somewhat more precise in conception the principles that I

find commonly recognised, and to make their application to particular cases as clear and consistent as possible.

In the first place, we are all agreed that laws ought to be just or not unjust:[1] and by this we do not merely mean that they ought to be justly *administered*—*i.e.* that the general rules of law ought to be impartially applied without "respect of persons" to the particular cases brought before the courts for judgment—but we mean also that these general rules themselves ought to be framed so as to avoid injustice. But when I try to give a definite signification to this principle, the only signification I can find which would really carry with it universal agreement is, that all *arbitrary* inequality is to be excluded: that persons in similar circumstances are to be treated similarly; and that, so far as different classes of persons receive different treatment from the legislator, such differences should not be due to any personal favour or disfavour with which the classes in question are regarded by him. This agreement therefore gives no positive guidance as to the plan on which our impartially framed laws are to be constructed: it does not enable us to say how far and on what grounds persons in different circumstances are to be treated differently.

I think, however, that we may go a step further, and claim general—if not universal—assent for the principle that the true standard and criterion by which right legislation is to be distinguished from wrong is conduciveness to the general "good" or "welfare." And probably the majority of persons would agree to interpret the "good" or "welfare" of the community to mean, in the last analysis, the happiness of the individual human beings who compose the community; provided that we take into account not only the human beings who are actually living but those who are to live hereafter. This, at any rate, is my own view. Accordingly, throughout this treatise I shall

[1] I say "or not unjust," because it would be commonly recognised that there is an ideal justice which we cannot hope to realise in the legal relations of the members of any actual community. But we shall certainly agree in holding that laws ought not to be unjust.

take the happiness of the persons affected as the ultimate end and standard of right and wrong in determining the functions and constitution of government.

I draw special attention to the inclusion of posterity in my statement of the ultimate end of legislation: because it appears to me that whatever force there is in the arguments urged,[1] against the view that the end of government is the happiness of the individuals governed, depends on the conception of these individuals as present, actually existing, members of the particular community in question. I fully concede that there are crises of national life in which it is the duty of the present generation of citizens, the actually living human beings who compose any political community, to make important sacrifices of personal happiness for the "good or welfare of their country," and that this good or welfare cannot be completely analysed into private happiness of the individuals who make the sacrifices. I should add that there are cases in which it is the duty of the members of one political society to make sacrifices for the good or welfare of other sections of the human race. But I hold that if this good is not chimerical and illusory, it must mean the happiness of *some* individual human beings: if not of those living now, at any rate of those who are to live hereafter. And I have tried in vain to obtain from any writer who rejects this view, any other definite conception of the "good of the state."[2]

If it is urged[3] that there are many most important sources of the happiness of human beings with which government has little or nothing to do, and which it will only make a mistake if it tries to control—art, literature, and for the most part industry—the answer is, that it appears from this very argument that the limits of government

[1] *E.g.* by Bluntschli. *Theory of the State* (translated), Book v.

[2] *E.g.* Bluntschli, *l. c.* (Book v. ch. iv.) speaks of "development of a people's natural gifts" and the "perfecting of a people's life;" but I know no criterion for determining wherein the perfection of life consists and for distinguishing the right development of natural gifts from the wrong development, if the utilitarian criterion be rejected.

[3] As by Bluntschli, *l. c.*, Book v. ch. iii. § 2.

interference in these departments are capable of being determined on utilitarian principles; for the argument is that interference beyond those limits will be demonstrably the reverse of useful—will be *not* conducive to the general happiness.

§ 3. We have thus arrived at the utilitarian doctrine that the ultimate criterion of the goodness of law, and of the actions of government generally, is their tendency to increase the general happiness. The difficult question how far, if at all, the interests of any one community are to be postponed by its government to the interests of other sections of humanity is one that we are hardly called upon to consider when we are discussing the internal functions of government, —the principles of its action in relation to the governed. The happiness then of the governed community will be assumed as the ultimate end of legislation, throughout the nine chapters that follow.[1] But even the acceptance of this principle gets us very little way towards a system of legislation: since we find it admitted equally by persons differing profoundly in their political aims and tendencies: indeed there is scarcely any widely spread political institution or practice —however universally condemned by current opinion— which has not been sincerely defended as conducive to human happiness on the whole. Hence, when we have agreed to take general happiness as the ultimate end, the most important part of our work still remains to be done: we have to establish or assume some subordinate principle or principles, capable of more precise application, relating to the best means for attaining by legislation the end of Maximum Happiness.

Now when we consider the different ways in which the happiness of individuals may be promoted by laws, the most fundamental distinctions appear to be two.

I. In the first place legal control may be exercised in the interest of the person controlled, or of other persons: the government may either aim at making each of the individuals

[1] Except so far as the pain of inferior animals is also taken into account, in legislation prohibiting cruelty to animals.

to whom its commands are addressed promote his own happiness better than he would without interference, or they may aim at making his conduct more conducive to the happiness of others. So far as the former is the avowed aim of government, its control resembles that properly exercised by a father over his children: accordingly this kind of governmental interference is commonly spoken of as "paternal;" and I shall adopt this as the most convenient name for it. The term is used with more or less sarcasm, because such interference—as applied to sane adults—is commonly regarded as being in general undesirable in modern civilised communities. The grounds for this opinion are chiefly these: (1) that men, on the average, are more likely to know what is for their own interest than government is, and to have a keener concern for promoting it, so that even supposing paternal legislation would be generally obeyed, even its direct effects are likely to be on the whole mischievous—taking into account the annoyance caused by coercion; and (2) that, even if its direct effects are beneficial, its indirect effects in the way of weakening the self-reliance and energy of individuals, and depriving them of the salutary lessons of experience, are likely to outweigh the benefit: while (3) such laws are likely to be largely evaded, as the persons primarily concerned do not feel interested in their being observed; again, (4) that even if any little good were done by this kind of legislation, it would not be worth the expense entailed by it both of money and of the energies of statesmen needed for other functions: and finally (5) that there is a serious political danger in the increase of the power and influence of government that would be involved in a consistent application of the "paternal" principle. I shall consider hereafter how far these arguments are valid to the complete exclusion of this principle: at present it is enough to say that neither in current political reasoning nor in the actual facts of legislation is anything more than a very subordinate place now ever claimed for its application. We are all agreed that, in the main, the coercion of law is and ought to be applied

to adult individuals in the interest primarily of other persons.

II. But here a second fundamental distinction suggests itself. The services which an individual is legally bound to render to others may be positive or negative: they may consist in doing useful acts, or in forbearing to do mischievous acts. Now there is no doubt that the constant rendering of reciprocal positive services is indispensable to the production of the greatest attainable happiness for the human beings who compose a modern civilised community; all agree, indeed, that such exchange of services has continually to become more complex and elaborate, if we are to realise the economic advantages of that development of industry which the progress of the arts continually renders possible. And most of us would readily accept, as a moral ideal, what I may call *ethical* as contrasted with *political* socialism; that is, the doctrine that the services which men have to render to others should be rendered, as far as possible, with a genuine regard to the interests of others: that, as J. S. Mill, after Comte, lays down, "every person who lives by any useful work should be habituated to regard himself, not as an individual working for his private benefit, but as a public functionary," working for the benefit of society; and should regard "his wages of whatever sort . . . as the provision made by society to enable him to carry on his labour." But it is generally held that it is the business of the moralist and the preacher, not of the legislator, to aim at producing in the community this habit of thought and feeling; that government should leave the terms of positive social co-operation to be settled by private agreement among the persons co-operating—in short, that what one sane adult is legally compelled to render to others should be merely the negative service of non-interference, except so far as he has voluntarily undertaken to render positive services; provided that we include in the notion of non-interference the obligation of remedying or compensating for mischief intentionally or carelessly caused by his acts—or preventing mischief that would otherwise result from some previous act. This

principle for determining the nature and limits of governmental interferences is currently known as "Individualism," and I shall refer to it by this name; the requirement that one sane adult, apart from contract or claim to reparation, shall contribute positively by money or services to the support of others I shall call "socialistic."[1]

The legislation of modern civilised communities then, is, in the main, framed on an Individualistic basis; and an important school of political thinkers are of opinion that the coercive interference of government should be strictly limited to the application of this principle. I propose, accordingly, in subsequent chapters, to trace in outline the chief characteristics of the system of Law that would result from the consistent application of the Individualistic principle to the actual conditions of human life in society. I shall then examine certain difficulties and doubts that arise when we attempt to work out such a consistent and exclusive individualistic system: I shall analyse the cases in which, in my judgment, it tends to be inadequate to produce the attainable maximum of social happiness: and I shall consider to what extent, and under what carefully defined limitations, it is expedient to allow the introduction of paternal and socialistic legislation, with a view to remedy these inadequacies.

[1] See Chapter x. I shall hereafter take occasion to point out that there is another and a different meaning in which the term "socialistic" is also used.

## CHAPTER IV

### INDIVIDUALISM AND THE INDIVIDUALISTIC MINIMUM

§ 1. In this and the four following chapters I propose to work out in some detail what I may call the "Individualistic minimum" of governmental interference: that is, the distribution of legal rights and obligations among private persons that results from applying the Individualistic principle, as strictly as seems practically possible, to the actual conditions of human life in society. But before I proceed to this examination, it ought to be noted that some Individualists view this principle in a light fundamentally different from that in which I have regarded it in the preceding chapter. They hold the realisation of freedom or mutual non-interference to be not merely desirable as most conducive to human happiness, but absolutely desirable as the ultimate end of law and of all governmental interference: an ideal good which would be degraded if it were sought merely as a means of obtaining pleasure and avoiding pain. I cannot directly refute this opinion, any more than any other opinion, as to ultimate ends or principles of right conduct; but I think it may be shown to be inconsistent, not only with the common sense of mankind, as expressed in actual legislation, but with the practical doctrines—when they descend to particulars—even of the very thinkers who profess to hold it. For the kind of laws which Individualists generally agree to recommend may be shown to require for their justification a utilitarian interpretation of the individualistic principle: that is, they require us to

conceive, as the general aim of law and government, not the prevention among the governed of mutual interference with freedom in the ordinary sense, but the prevention of mutual interference with the happiness that each naturally seeks for himself and his family. And I think that the attempt to show this, under each of the chief heads of individualistic legislation, will be the best way of clearing up our general conception of the individualistic principle; while at the same time it will afford a convenient opportunity of surveying the whole range of the subject before we proceed to consider it in detail.

Let us begin by examining the meaning of the words "Freedom," or "Liberty,"— which I take to be synonymous —as ordinarily used. When employed without qualification "freedom" signifies primarily the absence of physical coercion or confinement: A is clearly not a free agent if B moves his limbs, and he is not free if he cannot get out of a building because B has locked the door. But in another part of its meaning—which from our present point of view is more important—"freedom" is opposed not to physical constraint, but to the moral restraint placed on inclination by the fear of painful consequences resulting from the action of other human beings. There is, however, some disagreement as to the extent of this latter meaning: it is disputed whether my freedom is impaired so far as my action is modified by fear of the actions of any other human beings, or only if it is modified by fear of *governmental* action. The latter view was taken by Hobbes, who regarded the "state of nature"—that is, of no government—as a state of unlimited liberty, though also one of intense mutual fear. But this view is not, I think, supported by common sense: it seems absurd to say that it is contrary to liberty to be restrained by dread of the magistrate, and not contrary to liberty to be similarly or more painfully restrained by dread of the lawless violence of a neighbour: we should generally agree with Paley that not only happiness but liberty is less in the Hobbist state of nature than in a well-ordered political society. If it be granted, then, that my liberty is

impaired by the restraint on volition caused by fear of the acts of human beings generally, the statement sometimes made that "every law is contrary to liberty" is misleading, though in a sense true: since the diminution of liberty caused by the fear of legal penalties may be more than balanced by the simultaneous diminution of private coercion. It may be fairly said that the end of government is to promote liberty, so far as governmental coercion prevents worse coercion by private individuals.

We have, however, to observe that freedom is sometimes attributed to the citizens of a state, not because the governmental coercion applied to them is restricted to the prevention of private coercion, but because it is exercised with the consent of a majority of the citizens in question. Indeed, the notion of "liberty" in this sense—which may be distinguished as "constitutional liberty"—has had a very prominent place in political discussion. I do not wish to discard this use of the term altogether: but I think it is liable to be misleading. It may be fairly affirmed that a *body* of persons is "free"—in the ordinary sense—when the rules restraining them are in accordance with the corporate will of the body: but it is only in a very peculiar sense—liable to collide markedly with the ordinary meaning of the term—that "freedom" can be therefore affirmed of every *member* of the body. It is obvious that my inclinations may be restrained to any extent, and in the most annoying way, under a government of which the supreme control is vested in the mass of the citizens, if I have the misfortune to belong to the minority of this body: while, again, it is quite conceivable that under a despotic government I may be subject to no further coercion than is necessary to prevent worse coercion by private persons. Accordingly, when I speak without qualification of freedom as belonging to individuals, I shall not mean constitutional freedom, but civil freedom as above defined—absence of physical and moral coercion.

It is certainly conceivable that the maintenance of freedom in this sense should be taken as the ultimate and sole end

of legislation, and of governmental interference generally. But in fact, as I have said, all governments and (I believe) all Individualists practically go beyond this, and aim at protecting the governed from pain caused by the action of other human beings, and from loss or diminution of their means of gratifying their desires similarly caused. In so doing, I maintain, they adopt by implication a utilitarian view of the mutual interference that law ought to prevent, —even while expressly disavowing the utilitarian criterion.

§ 2. Let us proceed to particulars: and take first the class of rights which Blackstone distinguishes as "Personal Rights." We find that under this head all civilised systems of law aim at securing the personal *safety* of individuals no less than their personal *liberty, i.e.* they seek to prevent the infliction of physical injury or pain—even serious physical discomfort that can hardly be called pain—as well as the imposition of constraint. No doubt physical injury or pain usually involves a kind of constraint; since the injured man, even if not physically disabled, is prevented from doing what he likes by the fear of the recurrence of the injury. This is an important reason for preventing physical injury, and the main reason for making the mere threat of inflicting such injury a legal offence: but it would be absurd to maintain that assault and battery are prohibited solely on account of their tending to produce subsequent alarm in the person assaulted and battered, sufficient to have a coercive effect on his conduct: all would admit that they ought to be prevented, even if such coercive effect did not follow. Hence common sense clearly requires us to understand the non-interference, which such prohibition secures, to include not only non-interference with Freedom but non-interference with Happiness.

This is still more obviously true as regards the interference with physical comfort, prohibited under the head of nuisances; and I think it is also true of the attacks on reputation, which all civilised nations aim at preventing by law. No doubt such attacks may be a form of moral coercion: but it is not thought that my right to be pro-

tected against calumny depends on the question whether my action is likely to be modified by the unmerited dislike and contempt which the calumny has caused. It may, indeed, be urged that defamation of A by B tends to impair A's freedom of action, by rendering it difficult for him to obtain the co-operation of others. But it surely goes beyond our common notion of freedom to say that A is less free because other people will not do what he wants them to do: though he certainly is less able to gratify his desires. And as B's freedom is directly and palpably diminished if he is prohibited from saying what he thinks of A, the restraints of the law of libel can hardly be justified if freedom—in any ordinary sense—and not happiness, be taken as the ultimate criterion.

Again, Individualists agree that where law has not succeeded in preventing injury to person or reputation, it ought generally to enforce pecuniary compensation for the mischief from the wrongdoer, unless the injury is one that does not admit of being repaired;—so as to bring about a condition of things approximating as far as possible to what would have existed had there been no injury. From the point of view of utilitarian individualism this duty is clear; but if freedom be taken in the ordinary sense, it is hard to see how the loss of freedom can be compensated by money. Moreover, to say that the richer man, as such, enjoys more freedom than the poorer—which would be implied in such a rule of compensation, if freedom be taken as the ultimate end of law—would render futile the fundamental aim of these Individualists, which is to secure by law equal freedom to all: since no one professes to secure equal *wealth* to all.

This leads us naturally to consider the application of the individualistic principle in the department of law which is concerned with the protection of property. The Individualistic minimum of governmental interference is commonly stated to include "protection of property" as well as of "person": and it is obvious that an Individualist is bound to prevent any interference by one man with the property of another—either by actually excluding him from

the use of what he owns, or otherwise impairing its utility to him—if we suppose private property already instituted: since, in fact, the institution of private property *means* the prohibition of such interference. But we have yet to determine the prior question, why and how far the institution of private property can legitimately be included under the general principle of Individualism. And if we take freedom—in the ordinary sense—as an ultimate end, without any regard to utility, this inclusion seems to me very disputable; it would seem that the end would be most completely realised by preventing A from thwarting B's actual use of material things, without going so far as to support B in the permanent exclusion of other men from the enjoyment of things that he has once used. But from the point of view of utilitarian individualism, this protection of exclusive use is *prima facie* necessary in order that individuals may have adequate inducement to labour in adapting matter to the satisfaction of their needs and desires. The natural reward of labour is the full enjoyment of the utility resulting from it; without the prospect of this natural reward—or of some adequate substitute for it—we could not expect much of the labour to be performed. Hence, from the point of view of utilitarian Individualism, the mutual interference of individuals which law ought to prevent must include interference with each other's enjoyment of the results of his labour: and this is commonly stated as the fundamental principle on which the institution of private property is to be justified. But it is clear that this principle does not *prima facie* justify the appropriation of the matter to which the labour has been applied: and if, on the utilitarian ground above given, A is held to interfere with B by using matter to which B has applied his labour, we must also admit that B's claim to exclude A from this matter involves interference with A, if it appreciably restricts A's opportunities of adapting matter to the satisfaction of his needs and desires. Hence, if private property is to be justified on the individualistic principle—taken in a utilitarian sense—it must be shown either (1) that the thing appropriated would

not practically have been available for human use, if the appropriator had not laboured in seeking for it; or (2) that his appropriation does not materially diminish the opportunities open to other persons of obtaining similar things, owing to the natural abundance of such opportunities. On one or other of these grounds it is easy to justify the appropriation of such things as fish caught in the open sea, or wild animals, plants, or even minerals, found in large tracts of uncultivated country. But it is not so easy to deal with the question of property in land. It has, indeed, been maintained by Locke and others, that in the "beginning and first peopling of the great common of the world" the appropriation of land was similarly justifiable, "since there was still enough and as good left, and more than the yet unprovided could use." But however true this may have been in the beginnings of history, it would seem that at a comparatively early stage of social development the appropriation of land must have been deprived of this justification; and now, at any rate, the individuals who have not inherited land do not find "enough and as good" within their reach. And, in fact, when this question has been practically presented in a simple form—for instance, in relation to land as yet unappropriated, in a newly colonised country—it has not commonly been held that individuals desirous of using such land, for agricultural or other purposes, have a right to claim the exclusive use of as much land as they may find it convenient to occupy. The question, indeed, how such land is to be allotted, on the principle of mutual non-interference, is not an easy one: I shall consider it more in detail in the next chapter.

So far I have tacitly assumed that the labour necessary to adapt matter to human uses can be sufficiently encouraged by appropriating to the labourer the thing so adapted. There is, however, another case of property, of considerable importance in modern civilised communities, where quite peculiar obligations have to be imposed on non-owners: I mean the case of "patents" and "copyrights," by which the exclusive use of certain products of intellectual labour is

secured to the producers or to their grantees. Here, from the nature of the labour, the only way of securing its results to the labourer is by prohibiting other members of the community from imitating them. At the same time, such an interference with the freedom of action of the persons prohibited is difficult to justify from the point of view of absolute individualism—*i.e.* if freedom, in any ordinary sense, be taken as the ultimate end of law. I do not see how it can be shown that this prohibition of imitation tends to secure the persons concerned from physical or moral coercion; but it certainly tends to secure the greatest possible independent production of utility, assuming that the results that would be attained by imitation are such as the imitators could not possibly have arrived at independently. On this assumption, property in the results of intellectual labour, protected by patents and copyrights, is *more* simply justifiable on the principle of mutual non-interference, than property in material things: just because the labour is not "mixed" with matter. To what extent the assumption is in different cases legitimate I shall consider in the next chapter.

That an individual who has been allowed to appropriate anything should be allowed to transfer his rights over it wholly or partially to another is from our present point of view obvious: since such transfer involves no fresh interference with the freedom of others, while its prohibition would involve interference with the transferrer's freedom—provided always that the transfer is really a free act. But in the interpretation of this proviso difficulties again arise if Freedom is taken as an absolute end. It is commonly understood that such transfers ought to be invalid if obtained by force or fraud: and certainly if the transferrer was coerced or intimidated by illegal violence it is clear that the transfer was not free in the ordinary sense; but it is surely strained to say that his freedom is impaired by false representations on the part of the transferee.[1] From the utilitarian point of

[1] If we say generally that freedom is impaired through intellectual error caused by the action of others, we shall have to say that the majority in a democracy is not free when it is misled by demagogues: and this would surely be a paradox—though a suggestive paradox.

view, however, the desirability of preventing such misrepresentations is manifest. For the general utilitarian reason for giving validity to such a transfer is that the transferrer may be presumed to have consulted his own interest in making it: but if he has been deceived by false representations this presumption obviously fails: and it also fails if the transferrer was for any other special reason clearly incapable of forming a sound judgment of the value of the thing transferred or the considerations that induced him to transfer it. Thus we see the expediency of making the legal validity of such transfers depend on conditions tending to exclude, not merely coercion but deception, and also inadequate rationality on the part of the transferrer: and such conditions are in fact imposed, with certain slight variations, in the legal systems of all civilised countries.

So far I have spoken of transfers between living persons: it remains to consider how, on the principle of non-interference, property is to pass from the dead to the living. It is obviously expedient that when a man dies some definite successor or successors to his various rights of property shall be determined somehow: but it is less clear how far the will of the dead person should be allowed to determine it. On the one hand, it may be urged that it cannot be an interference with a man's freedom of action to preclude him from having any influence on the affairs of a world in which he no longer exists: on the other hand, if he could own property and transfer it up to the moment of death without encroaching on the freedom of other members of the community, it is hard to see how this can be interfered with by a transfer that takes effect after death. Each of these opposing negations is, I think, valid; so that the question will be difficult to determine, if Freedom—in the ordinary sense—be taken as an ultimate end. But from the point of view of Utilitarian Individualism it is clear that the abrogation of the power of bequest would interfere indirectly with the individual's enjoyment of the fruits of his own labour, since it would prevent him from obtaining the services of others, towards the close of life, in return for

promises of bequests: and thus would materially diminish the encouragement that Individualism aims at giving to labour and thrift,—especially in old age. Moreover, the abrogation would be likely to be generally inoperative, except where death was sudden and incapable of being foreseen; since, when the prospect of death was imminent, most men would prefer to transfer their property while alive to the objects of their preference, rather than leave it to be absorbed by the State. A restriction of bequest in the interest of children or other near relatives would not be exposed to the same objections; but such a measure is hardly justifiable on the individualistic principle—except in the special case of children unable to provide for their own livelihood. It is a different question whether a man should have full power to determine after death the manner in which the wealth owned by him is to be used, otherwise than by determining his successors in ownership. There are strong reasons for restricting this power, which I will consider later; here I will only notice a general utilitarian reason for allowing it to some extent, viz. that if it were not allowed, persons desirous of posthumously regulating the use of their property would be disposed to effect this by bequeathing it to persons pledged to carry out their regulations; and it would weaken the socially important habit of fidelity to compact if the latter were encouraged by legal impunity to violate their engagements.

In the last argument it has been assumed that the performance of contracts to render future services should in general be made legally binding. This is, indeed, a cardinal tenet of Individualists: I do not, however, see how it can be clearly deduced from the principle that adopts Freedom as an ultimate end; since a man would be more completely free —in the ordinary sense—if his volition at any given time could not be legally restricted by any previous expression of will as regards the future: though his power of attaining his ends would, of course, be diminished by his being less able to rely on the future actions of others. Moreover, if the realisation of freedom involves the performance of con-

tracts freely entered into, it would follow that—if freedom be the ultimate end—such contracts ought to be legally enforced in all cases in which they do not tend to impair the freedom of any third party. But no actual system of law attempts anything like this: in England (*e.g.*) no engagement to render personal services—with the doubtful exception of the marriage vow—gives the promisee a legal claim to more than pecuniary damages: all such contracts, if unfulfilled, turn into mere debts of money so far as their legal force goes. And on utilitarian grounds this limited and qualified enforcement of contract is justifiable: since, on the one hand, if men could not rely generally on the fulfilment of mutual engagements, the complex co-operation required for social wellbeing would be on a dangerously precarious footing; and, on the other hand, what is important from a utilitarian point of view is not that A should perform his promise, but that B should not be damaged by his non-performance.[1] From this point of view, again, there are obvious reasons for imposing certain further conditions on the legal validity of engagements for future conduct, even when freely entered into: similar in the main to those already noticed as limiting the legal validity of the transfer of property.

§ 3. The general maintenance of (1) the Right of personal security, including security to health and reputation, (2)

[1] Since the performance of a promise to render personal services might obviously cause loss or inconvenience to the promiser, outweighing the utility to the promisee, it seems—from the point of view of utilitarian individualism—a clearly excessive interference to enforce specific performance, wherever the damage to the promisee through non-performance is of a kind that admits of adequate pecuniary compensation. In other cases, in which pecuniary compensation would be inapplicable or inadequate, there is a different reason for not enforcing specific performance of contracts to render personal services, viz. that the utility of the service to the recipient depends on qualities which cannot be secured by legal coercion. *E.g.* a painter can be forced to paint a picture, but he cannot be forced to paint such a picture as his customer, in making the contract, desired to obtain. Still, if the end of Law were not utility but the realisation of Freedom—this being taken to include the enforcement of contracts freely made—the logical course would be to enforce specific performance, so far as possible, in all cases in which the promisee desired it.

the Right of private property, and (3) the Right to fulfilment of contracts freely entered into, constitutes what may be called the "individualistic minimum" of primary governmental interference so far as sane adults alone are concerned: on the individualistic principle, if the community consisted entirely of sane adults, any legal obligations not included under the above heads ought only to be of the secondary and subordinate kinds before mentioned—*i.e.* they could only be justified as conducive to the prevention or reparation of encroachments on these primary rights.[1] But, under the actual conditions of human life, every society contains a large number of persons with regard to whom the most thoroughgoing individualist recognises the absurdity of maintaining that they require no more from others than non-interference and observance of contract: it is universally admitted that some legal provision must be made for supplying lunatics and children with the means of subsistence, and some authority vested in some persons to restrain them from actions mischievous to themselves as well as to others. The case of children is, of course, by far the most important. Here, if we once admit that, with a view to the general happiness, the burden of supporting, directing, and training children must be legally placed somewhere, there can be no doubt that, on the individualistic principle, it must be thrown on the parents: since it would obviously be the gravest interference with an individual's freedom of action to compel him to contribute to the support of an indefinite number of his neighbour's children. Indeed, we may say that a State that had gone so far in the direction of communism as to undertake the burden of providing for all the children of its members could hardly stop short of completely communistic institutions. To secure the effective performance of parental duty, as thus defined, some provision for the registration of births in the names of both parents would seem to be required: but it is not easy to justify, on the indivi-

[1] These secondary rights and obligations will be considered in a subsequent chapter (ix.) on the Prevention and Reparation of Wrongs.

dualistic principle, the refusal, which is found in the legal systems of all European communities, to recognise any connubial contracts that do not contemplate a permanent and monogamic union. At any rate both this refusal, and other restrictions on the free union of the sexes, such as the prohibition of marriage between near relatives, can, I conceive, be only justified—in a strictly individualistic system—as indirectly necessary to provide for the due support and education of children. The exact kind of regulation which, from this point of view, would be most expedient in a modern civilised society is, I think, impossible to determine from any general consideration of human nature, in which the inherited customs and sentiments that actually govern the relations of the sexes in such societies are left out of account. And since it is fundamentally important, for the attainment of the general end at which law aims in this department, that a strong unreflecting moral aversion should be felt for the conduct legally prohibited, it would probably be inexpedient in the present treatise to weigh the utilitarian arguments for or against particular details of the marriage law. It is sufficient to say generally that the individualistic legislator must judge all actual or proposed restrictions on the free union of the sexes from the point of view that has just been indicated: in respect, that is, of their tendency to secure due provision, control, and training for children until they are old enough to become ordinary members of an individualistic community.

Assuming the marriage union to be, under ordinary circumstances, indissoluble, it seems almost necessary to maintain by law the right of the husband to the society of his wife; and, on the other hand, to give the wife the right of obtaining from her husband the means of subsistence, so far as her own income from property or earnings does not suffice for this purpose;—either right being liable to forfeiture on account of conjugal infidelity or other gross misbehaviour. Whether it is desirable—with a view to "prevent domestic dissension or distrust"—to go beyond

this in the way of extending the husband's control over the wife's property or actions, and correspondingly extending the protection given by law to the wife in case the husband misuses his powers, is less easy to decide; but we may say that, from an individualistic point of view, the burden of proof lies entirely with those who advocate such further restrictions on Freedom. As regards the definition of parental duties and rights, it seems clear that—on the individualistic principle—the period of parental control should not be prolonged beyond the time at which the child reaches physical and intellectual maturity; and that, as the growth towards maturity is gradual, legal independence should also be reached by degrees. I do not think it is in accordance with the individualistic principle that the legal duty of parents to children shall extend beyond that of giving care and sustenance up to the time at which they can earn their own living, and such training as will enable them to earn it; but the point will be considered when we come to deal with bequest and inheritance.

To sum up, I conclude that I am in harmony with common sense in taking, as the fundamental basis of individualistic legislation, not the proposition that freedom is to be sought as an ultimate end, but what may more appropriately be called the principle of mutual non-interference, understood in a utilitarian sense. On this view, the general aims of individualistic legislation may be stated as follows: (1) To secure to every sane adult freedom to provide for his own happiness, by adapting the material world to the satisfaction of his needs and desires, and establishing such relations with other human beings as may in his opinion conduce to the same end; (2) to secure him from pain or loss, caused directly or indirectly by the action of other human beings—including in this loss any damage due to the non-performance of engagements made without coercion or deception; while (3) throwing on parents the duties of care, sustenance, and education of children, until they are able to provide for themselves, and regulating family relations —and to some extent the relations of the sexes generally—

with a view to the better performance of such parental duties. To the chief legal rights and duties established under this last head I shall occasionally refer as "family" rights and duties; but, for the most part, I shall abstain from examining them in any further detail.

§ 4. Let us now proceed to consider more fully the application of the individualistic principle, thus understood, to the relations, other than domestic or sexual, of sane adults: that is, to determine the chief particular rights into which the general right to non-interference naturally breaks up, when we seek to realise it under the actual circumstances of human life in society.

The following appear to be the chief ways in which A may interfere with B's interests or happiness—otherwise than by physical constraint or confinement which I need not further discuss: (1) By impeding his efforts to adapt his material environment to the satisfaction of his needs and desires: (2) by breach of contract: (3) by causing him physical injury or discomfort: (4) by interfering with his relations to other human beings: (5) by false statements, leading him to act or abstain from acting in a manner detrimental to himself: (6) by moral coercion or intimidation: (7) by causing him mental annoyance of some other kind. In the chapters that follow I shall be chiefly concerned with the rights and obligations to be established under the first two heads: since the regulation of the use of material things—and especially of that exclusive use which is the essence of property,—and the determination of the conditions of legally valid contracts, are the most important topics in a general survey of civil law from a political point of view. Contract is the main link by which the complex system of co-operation that characterises a modern civilised society is knit together: while the most marked differences in the outward lives of ordinary members of a modern society depend mainly on differences in the extent of their rights of property; and consequently the acquisition of property is usually the most prominent aim of the actions of such persons in their most important social relations outside

their own families. Under the remaining heads much fuller discussion is needed, to work out a sufficiently precise statement and adequate justification of the rules practically required; but of this further discussion, in such a treatise as the present, only a brief indication can be given.

The general problem, presented to an individualistic legislator in different forms under these different heads, is that of adequately protecting A from loss, pain, or alarm, caused by the action of B, without unduly annoying or hampering B. In many cases experience alone can enable us to determine the best middle course to take between opposite dangers: but we may note some of the general considerations by which this course will be determined.

I. It is one of the most obvious duties of men living in society to avoid causing physical injury or discomfort to others: and where avoidable damage or serious annoyance of this kind has been even unintentionally inflicted, there is a *primâ facie* ground for exacting adequate compensation from the doer to the sufferer of the harm.[1] But we may reasonably go much further in repressing acts of this kind, when demonstrably done with intent to injure or coerce, than we can go in repressing similar acts done without any such intention: partly because an act externally the same becomes indefinitely more annoying and alarming when its intention is malevolent or coercive, partly because it is not usually a severe or dangerous restriction on any one's freedom of action to preclude him from efforts to annoy or alarm others. For instance, it may be slightly annoying to be pushed or jostled in a crowd: but if this annoyance were treated as a wrong, the care imposed by the duty of avoiding it under all circumstances would be a much greater burden than the annoyance it was designed to remedy: we may, however, reasonably treat as an offence any pushing or jostling with intent to annoy.

II. The same point is important in considering how far A is to be legally restrained from causing loss or annoyance

[1] The most difficult case is that of pure accident without anything like negligence. This will be discussed in a subsequent chapter (viii. § 2).

to B by interfering with his relations with other persons. Here, however, we must first notice another distinction of fundamental importance: the interferer may either induce other persons, in domestic or social relations with B, to violate actual obligations, or he may merely induce them to abstain from making agreements with B, or rendering him services not legally due. The general expediency of prohibiting the former kind of interference is obvious: a man who commands or requests another to commit a wrong should be regarded as himself a wrong-doer. A partial exception, however, seems to be needed in the case of breaches of contract: since, in some cases, the performance of promises to render personal services would be inexpedient, as being much more injurious to the promiser than beneficial to the promisee; so that the law ought not to enforce specific performance of such promises, but only adequate pecuniary compensation for non-performance. It would therefore not be right in such cases to inflict any penalty on one who had advised a breach of contract, unless he had also advised non-payment of reasonable compensation, or unless his advice had been given with a demonstrable intent to injure or coerce the promisee. But in the case of contracts where specific performance should be legally compulsory—such as contracts to pay money, or transfer other wealth—I conceive that the offering of inducements to break the contract should be regarded as a wrong.

There is more difficulty where the acts to which the interferer offers inducement are acts in themselves lawful, though seriously damaging or annoying to B; since acts of this kind are inevitable incidents of industrial competition. That competition may go on, A must be allowed to persuade B's customers to desert him *en masse*, and transfer their custom to A, even though the result may be industrial ruin to B. Here it seems right to have regard partly to the ulterior intention; if the interference damaging to B is designed to promote A's business interests, in the ordinary course of the competition for industrial prosperity, it must be treated as legitimate—if otherwise lawful—in a society

individualistically organised: but if its aim is demonstrably to injure B, it must be regarded as falling within the class of interferences which—if the mischief they cause be considerable—may be proper subjects for legal repression.[1]

One specially important mode in which a man's relations to other human beings are liable to be injuriously affected is by statements damaging to his reputation: at the same time a most important part of the mutual services which the members of any society are capable of rendering consists in pointing out defects in the character and conduct of others. Here, accordingly, the problem of preventing as far as possible injury to reputation without doing more harm by restricting freedom of communication, is peculiarly difficult. The simple solution of allowing true damaging statements to be made but prohibiting false ones, is not satisfactory: since to penalise every untrue damaging statement, even though made in perfect good faith, would render the functions of warning and criticism too dangerous; on the other hand, there are many true statements of which the publication would be clearly mischievous,—as the pain and bitterness caused by them would much outweigh their utility in the way of warning. Perhaps we may distinguish three classes of cases:

(1.) There are certain public occasions in which the importance to the community of a full and candid utterance of a man's belief seems to be so great as to outweigh entirely the risk of harm to private reputations from such utterance. Thus, according to English law, "the freedom of speech and debate in Parliament" cannot be "impeached or questioned in any place outside Parliament"; an action will not lie against a judge for words spoken by him judicially, nor against an advocate, party, or witness in any case for anything relevant said in the course of judicial proceedings. And these securities seem to be required for the due performance of governmental functions.

(2.) In other cases in which it is, generally speaking,

[1] The propriety of interference of this kind, when its aim is coercive without being demonstrably malevolent, will be considered presently.

clearly for the interests of society that men should state beliefs honestly entertained by them respecting the character or conduct of others, such statements, however injurious to reputation, should not entail a liability to legal penalties, even if they turn out to be unfounded, unless they can be shown to have been made from some improper motive, or with reckless disregard of the ordinary means of ascertaining truth. Examples of this class are confidential communications about the character of a servant; warnings given by a solicitor to a client, or a guardian to a ward; "fair comments", on matters that have been brought before the public.

(3.) In cases where there is no general probability of advantage to society from the free communication of candid opinions, the importance of protecting individuals from damage to reputation would seem to outweigh the general considerations in favour of freedom of speech. In such cases, even if a man utters his honest opinion without malevolence, he should do so at the risk of having to make reparation if any statement seriously injurious to others should turn out to be false in any material point. It is more doubtful whether a man should be liable to be punished even for true defamatory statements, unless he can show that it was for the public benefit that they should be made; but probably it should be illegal to make such statements from malice, or with a view to private gain.

III. A somewhat similar problem is presented in the case of injury done to a man by false statements made not *about* him but *to* him. If statements of this kind can be shown to have been made with intent to mislead, it seems clear that they—as well as other deceptive acts—should be repressed by making the deceiver liable for any serious damage caused by his deception. But if there is no demonstrable intention to deceive, the question is less easy; since it would too seriously hamper the freedom of human intercourse if a man were held legally responsible for all the harm done by statements made to other men without an exact regard to truth. If, however, A makes statements to

B with the deliberate design of inducing him to act in a certain way for the promotion of A's interests, it is specially incumbent on him—and not too much to require—that he should resist the temptation to make statements which he does not know to be true, in the hope that they may turn out to be so; hence, in this case, not only consciously false but grossly reckless statements, which actually cause material damage, may fairly be regarded as wrongs needing reparation.

IV. Under the head of moral coercion or intimidation, a distinction has to be taken similar to that which has already been pointed out in considering interference with social relations. There can be no doubt that to cause alarm by doing or threatening wrongful acts, or to endeavour by any kind of threats to induce a man to do wrongful acts or abstain from fulfilling definite duties, are wrongful interferences, which call for legal repression. But when A, by doing something in itself legitimate but damaging or annoying to B, induces B to act in a manner opposed to B's interests or inclination, but not involving a breach of legal duty, it is a more difficult question whether this kind of intimidation can in any case be regarded as a legal wrong from an individualistic point of view. We can hardly lay down that an intention to *coerce* renders an act wrong which would otherwise be legitimate, no less than an intention to injure. For there are many cases in which a coercive intent is also plainly beneficent, either in the interest of the person coerced or of the community: as when a father notifies to a son that he will lose a legacy if he runs into debt, or when persons are prevented or reclaimed from vice by fear of exclusion from social relations. It would be paradoxical to regard such warnings and exclusions as wrongs, merely because they are intended to be coercive. Again, coercion of a certain kind is a natural incident of commercial exchanges: the buyer forces the seller to lower his price by refusing to buy, and *vice versâ*. At the same time, whenever the direct or main intent of any action is to induce a man by fear of damage

to do what, apart from such inducement, he would consider to be opposed to his interest, the action seems to be at least of doubtful legitimacy from an individualistic point of view; and cases similar to those above mentioned may easily be found which would be generally disapproved; *e.g.*, if a father were to warn a son that he would lose a legacy if he did not join the Church of Rome, or if an employer were to give notice that he would engage no workmen who declined to take a pledge of abstinence from tobacco. So again, a trader would be widely censured who sold his goods at unremunerative prices in order to drive another trader out of the business. On the whole, we may say that conduct of this kind lies on the ambiguous margin between what an individualistic code should allow and what it should prevent: and that it would not be contrary to the individualistic principle to subject it to legal repression in any special case in which a demonstrably coercive intention was combined with gravely mischievous results—provided that this special case could be clearly defined and distinguished from other cases. A particular case that is free from difficulty is where the act threatened is one that *either* ought not to be done at all, *or* ought to be done with a view to the public benefit;—such as an accusation of crime. The wrongfulness of threatening an act of this kind with a view to private gain, to be obtained by inducing persons whom it might harm to purchase the threatener's silence, is easily recognised and defined. Another case that specially invites the legislator's attention, as specially menacing to the freedom of individuals, is where a number of persons combine to intimidate by threatening acts which, though not illegal apart from their coercive purpose, are demonstrably threatened and carried out for this purpose.[1]

V. It remains to consider how far the causing of mental annoyance, without demonstrably malevolent intention, is to be regarded as an interference which law ought to prevent. Reflection will at once show that we cannot hope to prevent this with anything like completeness. B may be offended by

[1] This case will be further discussed in a subsequent chapter (xxviii.).

the colour of A's dress or the cut of his beard, his movements in public, and the expression of his opinions and sentiments; but it is obvious that the attempt to shield B completely from annoyance thus caused would involve tenfold more vexatious interference with A. And, in fact, in modern civilised communities the only important class of acts that are repressed by legal penalties[1] as tending to cause merely mental annoyance—without causing or tending to cause injury or loss in some other way, or reasonable fear of injury —are statements affecting reputation,[2] and these are only prohibited under legal penalties when they either involve misrepresentation of facts or are held to show malevolent intention. In all other cases of offensive and annoying acts prohibited by law, we find at least an indirect tendency to cause a violation of some legal rule that rests on other grounds. Thus indecency is prohibited because the sentiment it offends is indirectly protective of the institution of the family; and I conceive that the primary aim of law in prohibiting blasphemy is not merely to prevent the mental pain it causes to believers in the established religion, but to prevent religious beliefs from being weakened, on account of their importance to social order.

[1] The reader will bear in mind that the word "penalty" is throughout this treatise used in a wide sense, to include any loss or inconvenience resulting from the action or inaction of government to the individual who transgresses any legal rule.

[2] It should be noticed that in English law it is only written defamation (libel) that incurs legal penalties, without causing any harm beyond ridicule and contempt.

## CHAPTER V

### ON PROPERTY

§ 1. In the present chapter I propose to consider the main regulations in respect to Property which a consistent legislation on the basis of utilitarian individualism will include. For clearness' sake, it seems best to discuss separately the two distinct questions: (1) What we mean, or ought to mean, by the "Right of Property," considered as actually belonging to any individual: what different elements of legal right secured to the proprietor—and corresponding legal obligation imposed on the non-proprietor—the conception includes, or ought to include? and (2) Under what conditions should the whole or any part of these different rights be legally acquired?

In dealing with the first question it will perhaps be most convenient to take the common notion of the "Right of Property" and analyse it into its elements: and, so far as these elementary rights are separable, to observe the different grounds for maintaining them separately or in combination in different cases. For clearness, we will, in the first instance, limit our consideration to property in material things.

We may begin by observing that the most widely extended right secured to members of an orderly community in respect of material things is merely a right to use transiently, to make the material thing a means to the satisfaction of needs and desires, not necessarily combined with any right to exclude another from using the same thing immediately

afterwards, or even at the same time, so far as this second use does not actually impede the first. The obligation corresponding to this right is merely that of not interfering with actual use. And in the case of things of which the utility does not result from human labour, and which can be used simultaneously or successively by an indefinite number of persons, without any considerable amount of mutual interference, it is obvious that there would be a decrease of utility on the whole, if any one person, or group of persons, might claim exclusive use. Thus, if a piece of land is most useful on the whole as an area for common recreation, it is obviously inexpedient to allow it to be appropriated in separate portions for the separate use or enjoyment of particular individuals. Sometimes again, a thing is made most useful when the right to use it in one particular way is given to one or more persons, while the rest of the utilities derivable from it are secured to others,—as when A owns land, but a right-of-way over his land belongs either to B, a neighbouring owner, or to the world at large.

It is not, however, the mere right of unhampered use which constitutes the most essential element in the Right of Property, as commonly conceived: but the right of *exclusive* use. This is always implied in the idea of appropriation: but the obvious utilitarian grounds for it are different in different cases. Some things—such as food—if used at all, can only be used once, and therefore by a single individual: so that the undisturbed use of them is impossible without appropriation. In other cases it is obvious that at any rate the most effective use of the material thing in question—either for immediate enjoyment or as an instrument or material for producing things directly consumable—requires that the user should have the legal right of excluding other persons from any similar use of the thing, or any action materially affecting its physical condition, at least for a considerable period of time. If a field is to be used for the cultivation of crops it is obviously expedient, even in a primitive condition of agriculture, that it should be under

the exclusive control of one person—or of a group of persons capable of acting as one—at least during the time that intervenes between one harvest and another: and as the art of agriculture develops, the requisite period of continuous single control tends to become longer.

More often, however, the ground for legalising the exclusive use of material things does not lie in the fact that the things are thus obviously made more useful, but in the fact that their existence is due to labour spent in producing and guarding, which could not have been expended if the labourer had not been able to count on the exclusive enjoyment of his results: and it is, as we have seen, from this point of view that the right of property is commonly justified by Individualists;—as a stimulus to produce useful things, rather than as a means for making their utility when produced as great as possible. But, whatever its *rationale* may be, it is this right of excluding all others permanently from any physical dealings with a particular portion of matter, which we have to regard as the most essential element in the Right of Property in material things.

We may observe that in the case of non-exclusive no less than of exclusive use, the protection from interference which law gives to the user may be of an indirect kind. Thus, where the water of a stream is used to turn the wheels of a succession of water-mills in its descent, it would be obviously inexpedient to allow the water to become the property of any of the millowners: but in order to encourage them to make the water useful in this way it is expedient to protect them against a diversion of the course of the stream at any point above their mills. And on similar grounds, the owner of a house is not merely protected against the forcible entry of a stranger, but for the loss of utility caused by the pollution of the surrounding atmosphere. How far such protection of A from indirect interference should be given, where it involves a material restriction on the freedom of action of other persons, can only be settled in any particular case by a careful balance of conflicting inconveniences.

We have already noticed that the utilities of some things —such as food and fuel—are completely exhausted in a single use; sometimes, again, as in the case of clothes, ordinary use involves gradual deterioration. In either case it is not practicable to separate the Right to use the thing from the Right to destroy it, totally or partially: and, accordingly, this latter right is included in the common notion of the right of property. If, however, in the normal and proper use of a thing it either does not tend to be deteriorated, or tends to have its original utilities continually restored, it is possible and may be expedient to secure to an individual the exclusive use of it for life or a term of years, without also allowing him to destroy or deteriorate it. Thus, when land used for agricultural purposes is let on lease, some provision against deterioration is generally expedient.

Finally, the right of property is commonly held to include the Right to Alienate by gift or exchange during life; and perhaps also the Right to Bequeath. But either of these may be separated from the right of exclusive use: in fact, this separation is usual when the right of exclusively using a thing of comparatively permanent utility is limited in time. The application of the term "Property" to a right so limited is perhaps unusual, but I think it is more convenient to use the term, with a qualification, in this wider sense. If the right of deterioration and the right of alienation are withheld, the right of bequest is usually withheld along with them; in which case the right of ownership is reduced to the right of exclusive use during life or for a term of years. At the same time it is of course possible to restrict freedom of bequest, while leaving owners free to do what they will with their property during life: and, as was before observed, freedom of bequest — regarded as a deduction from the general principle of Individualism—occupies a very different position from freedom of use or of alienation by act *inter vivos;* and a much more dubious position. Moreover, some important restrictions on freedom of bequest, applying to property generally, are found in modern European codes,

whereas freedom of alienation during life is ordinarily unrestricted. I have therefore thought it most convenient to treat the right of bequest separately. I shall accordingly mean by the "Right of Property"—when used without qualification—the complete right of exclusive use, including the right to destroy and the right to alienate; but not necessarily the right of bequest.

§ 2. I now pass to consider how this right of property should be acquired. In the first place, it is clear that in a modern society where the right of property, including the right of transfer by sale or gift, and regulations determining the succession to property after the owner's death, are fully established, the most important part of the material wealth owned at any time will have been obtained by transfer during life or inheritance after death. In the two following chapters I propose to consider more in detail the conditions under which such transfer should be allowed, and regulations for bequest and intestate inheritance: in the present chapter I shall confine myself mainly to the consideration of the legitimate origin of property in things not yet appropriated. In discussing this it is important not to confound the *legal* rights secured in respect of material things with the *moral* right to the produce of one's labour, which constitutes, in the individualistic view, the principal justification and basis of legal rights of property. Simply to place this moral right under the sanction of law, by laying down a general legal rule securing to each individual the results of his labour, would be an obviously imperfect solution of the problem of determining the legitimate origin of rights of property in material things. For a man does not create matter by his labour, but only modifies it: and the fact that he has spent his labour on material to which he had no right could at most give him a right to an equivalent for the additional utility that it has thereby acquired. It is necessary, therefore, in a system of law, to determine how the individual's rights stand in relation to matter *before* it is modified by labour.

Here, first, it is to be observed that a thing may require

search, or pursuit, and perhaps the exercise of skill or strength in capture, in order that it may be obtained and used for human purposes; and that then the labour of seeking or hunting is really invested in the thing before it comes into a man's possession. On this ground, as was before said, the simple rule of appropriating the thing so found or captured to the individual finder or capturer is an unexceptionable application of the individualistic principle, provided that other men's opportunities of obtaining similar things are not thereby materially diminished. The thing with all its utilities is not an excessive reward for his labour, if any one else can get as much by similar labour. It is therefore reasonable that wild animals, that are not in any degree the product of human labour and care, should belong to those who have effected their capture: and that other things admitting of being moved and carried off should—unless they have already been appropriated, or are lying when found on appropriated land—become the property of those who have first physically seized them. But in the case of most useful inanimate things human labour is primarily required not for search or capture, but to foster their growth on the surface of the soil, or to extract them from beneath the surface: thus, in order to obtain them it is necessary that the land should be appropriated, at least temporarily, to the exclusive use of the labourer: and the question is how this can be done without encroachment on the rights of other persons.

In a country as fully populated as the civilised countries of Europe are, appropriation has already gone so far that the question of the conditions under which we ought to allow land to be appropriated does not arise in any simple form:[1] it is, therefore, most convenient to consider it in reference to land in a country newly colonised. By what method of allotting such land among private persons

[1] It is true that the transfer of common land to private ownership is a process still going on in England: but the land that is thus transferred is already the subject of definite rights belonging to a particular group among the members of the community, and cannot be appropriated without the consent of a definite proportion of this group.

desirous of using it for agricultural or other purposes can the individualistic principle be most faithfully carried out? how shall we decide how much any individual is to be allowed to take possession of? The most obvious answer is, as Locke suggests, that each may appropriate as much as he can really occupy and effectively use. But, first, as I have elsewhere said,[1] "the use of land by any individual may vary almost indefinitely in extent, diminishing proportionally in intensity—*e.g.*, it would be absurd to let any individual claim possession of the whole ground over which he could hunt, as against another who wished to use it for pasturage: but if so, ought the shepherd, again, to have possession as against a would-be cultivator, or a cultivator as against a would-be miner. Even if we confine our attention to one kind of use similar difficulties occur." And, even if such difficulties as these could be overcome, a more fundamental objection would remain; viz., that the condition necessary to justify appropriation of any utilities on the individualistic principle—that other men's opportunities of obtaining similar utilities were not materially diminished—would soon become impossible to fulfil: new comers would find no land as good as that which had been first appropriated. I do not think that this objection can be altogether met: it must be admitted that private property in land involves a substantial encroachment on the opportunities of applying labour productively which—were it not for such appropriation—would be open to individuals now landless. On the other hand, appropriation, at least for a term of years, is required, on the principle of utilitarian Individualism, to stimulate and reward the most energetic and enlightened application of labour to land. Under these circumstances, the best practicable application of the individualistic principle is to allow appropriation but to secure adequate compensation for the encroachment involved in it. At first sight it would seem that the rights of members of the community generally would be adequately guarded if the land were freely sold to the highest bidder

[1] *Principles of Political Economy*, bk. iii. ch. iv. § 12.

for what it could fetch and the proceeds invested for the permanent benefit of the community: since its market-price may be taken to represent with sufficient accuracy the utility that it has before it is appropriated and adapted for cultivation. But if a better bargain can be made for the community by letting the land for a term of years instead of selling it outright—in consequence of the recognised tendency of land to increase in value as a country becomes more densely populated—it certainly cannot be said that the individualistic principle requires the method of sale to be adopted rather than the method of lease.

In short, if it be granted—as I should grant—that the landless members of the community have a legitimate claim to compensation for the opportunities of applying labour to land from which they are excluded by its appropriation, then the question as to the manner in which this compensation is to be taken can only be decided, I conceive, by a careful balance of expediencies. On the one hand, it is for the general good that the individual cultivator's energy and enterprise should be encouraged as much as possible, and complete ownership is the most simple and effective way of encouraging it: on the other hand, it seems probable that the prospective increase of value, accruing independently of the owner's energy and enterprise, will not be adequately represented in the sum received for the sale of the land, so that the compensation thus directly secured to future generations, for the opportunities from which they are excluded, is not likely to be adequate. In practically deciding the question we have to take into account considerations that do not fall within the scope of the present discussion: since we cannot but be partly influenced by the moral and intellectual qualities likely to be possessed by the government that, if the system of leases be adopted, will have the delicate task of artificially providing for the lessee that encouragement of industry and thrift which the system of private ownership gives him naturally.[1]

[1] It is to be observed that I am here only dealing with the application of Individualism to land-tenure in a new country. The question whether land

So far I have been considering the arrangements that would be expedient in a region only partially settled. But I do not regard the question as fundamentally different in an old country, and I think that the expediency of taking land into common ownership in a district where it has been completely appropriated ought to be determined mainly by the same balance of considerations as the expediency of allowing appropriation in a new country: only in the latter case, in order to reduce the financial difficulty of compensating existing proprietors,[1] it would probably be necessary that the time at which the community would resume its rights over the land should be made a distant one.

§ 3. To whatever extent the surface of the earth is appropriated to the exclusive occupation of individuals, its *vegetable* products will, of course, belong primarily to the occupier, as—generally speaking—no one else can enjoy them without his consent. Often, of course, their growth is altogether due to his exertion and care, or admits of being materially aided thereby; in fact the encouragement of such production is, as we have seen, the chief end that justifies the appropriation of the soil. So again, where the labour and care of the occupier is directly applied to tame animals that feed on the natural produce of the soil, the appropriation to him of the progeny of the animals is justified on similar grounds. By "tame" animals we mean such as are normally within the control of some man, so that they can at any time be physically taken into possession by him: if they stray beyond his control, it is through accident or the enticement of other men, and their ownership is normally ascertainable by some natural or artificial mark. It is obvious that the exclusive use of such animals may be appropriated to individuals without much more difficulty than that of inanimate things. The case is different with animals which we call "wild," *i.e.* which require some process of capture, uncertain in its results,

should be granted on easier terms to encourage emigration belongs to a later part of the discussion. See Chap. x. on "Socialistic Interference."

[1] See Chap. xii.

before a man can take possession of them.[1] Still, if their existence is entirely or largely due to the labour and care of the landowner or his employees, our general principle would seem to justify us in prohibiting other men from taking possession of them, so far as their ownership is clearly ascertainable, as (*e.g.*) if they belong to a particular rare species. Where this ascertainment is practically impossible, the prohibition would be futile: but even then, so far as they can be prevented from straying, their exclusive use is indirectly secured by appropriating the land. It is, however, obvious that in the case of land whose only useful produce consists in wild animals and vegetables, capable of living and thriving without human labour or protection, one main argument for allowing appropriation is absent. Still, the appropriation of such land—assuming a fair compensation for the utilities thus withdrawn from the community—seems to be as legitimate an application of the individualistic principle as its appropriation for agricultural use; provided that its appropriation tends materially to increase the utility obtainable from such land: in considering which we have to take into account the enjoyment derived from hunting wild animals, as well as the utility of the animals when captured. If the whole *quantum* of utility obtainable in these two, and any other, ways, when the land is allotted to the exclusive use of individuals, is clearly greater then the whole *quantum* of utility that may be expected to result from leaving it common, appropriation, whether by sale outright, or lease for a term of years, seems clearly expedient: if it is clearly less, the utilitarian legislator will unhesitatingly decide to prohibit such exclusive use; but, of course, in any

[1] The criterion adopted by the Romans for distinguishing "tame" from "wild" animals—and widely followed in modern law—was the "animus revertendi." A creature that had a "disposition to return" after straying was tame: if it had no such disposition it was wild. It might have it and lose it: it then relapsed into its natural wildness. It seems to me, however, that it is rather the owner's prospect of getting possession of the animal than its own state of mind which is primarily important from a utilitarian point of view.

concrete case the balance of utilities may be difficult to ascertain.[1]

§ 4. There is no necessity that the appropriation of the surface of land should carry with it an exclusive right to extract the minerals which lie below the surface; and their existence is obviously not in any way due to the labour and care of the individual who has appropriated the surface, or of any subsequent owner. If, indeed, such minerals are of a common kind, it would be a needless and vexatious interference with the freedom of the owner of the surface to prevent him from appropriating them; since he cannot thereby gain any material advantage which might otherwise have been enjoyed by other members of the community. If, however, the minerals are at once so rare and useful that a considerable *quantum* of extra value is obtainable by the labour spent in extracting them, as compared with other labour, it is *primâ facie* right, on the individualistic principle, that this extra value should be shared equally by all members of the community; except so far as the extra value is needed as a reward to stimulate the labour that has to be spent, on the average, in *searching* for the rare mineral. This last consideration is of course important: and since the owner of the surface is generally in the best position for ascertaining what lies beneath it—especially if he is allowed to extract common minerals—there is an obvious utility in allowing him to appropriate even the rarer and more valuable contents of the earth; since the total amount extracted will thus tend to be increased to the advantage primarily of the producer, but indirectly of the community as a whole. Whether this gain to the community is likely more than to compensate for the loss of the extra value of rare minerals which the government might secure, in whole or in part, if property in the surface were strictly separated from property in the contents, is a question which only experience can enable us to answer; and which may perhaps require a different answer in reference

[1] The question how far *market value* can be taken as a measure of utility will be discussed later.

to different minerals, and different social and industrial conditions. In any case, it seems desirable to provide for the not improbable contingency that the owner of the surface may not be the person best qualified either to ascertain the presence of minerals hidden some way below the surface, or to decide whether their extraction will be remunerative: and, for this purpose, it seems best to retain for the government, or allow to individual members of the community generally, the right of extracting minerals from land owned by others; under condition of paying adequate compensation to the owner of the surface, and avoiding certain parts of his land where their operations would be likely to cause special inconvenience.

The exact determination of the limits of private and common property in land is, as we have seen, a matter which has to be settled by the aid of specific experience on a balance of conflicting considerations; it has, in fact, varied very much in different ages and countries in which private property in moveables has been completely established. There are, however, important and extensive portions of the earth's surface which individuals have never been allowed to claim for their exclusive use,—their utility being clearly greater when they are not appropriated: those, namely, which are covered by the sea or by navigable rivers. But since the boundaries of these portions are not permanently fixed, but in many cases change continually—though, for the most part, very slowly—a question arises as to the ownership of the strips of dry land that are from time to time won from this watery region: and it may be instructive to consider briefly the general rules for deciding this, in accordance with the principle so far adopted. If such accessions to *terra firma* take place by the mere action of natural forces, and cannot be materially aided by human labour, it is obvious that no individual can have a claim to them, and that the increment of value which the neighbouring lands receive through the change ought to belong to the community. So far, on the other hand, as the acquisition or maintenance of the new land requires labour, it is reasonable to let it become the

property of those who are in the best position to apply the required labour; that is, generally speaking, of the proprietors of the neighbouring land,—unless uniformity of action is on special grounds desirable, as may be the case with low land protected by dykes.[1]

§ 5. Hitherto we have been considering the Right of property, according to the commonest conception of it, as implying the right to exclusive enjoyment of the entire aggregate of utilities derivable from some portion of matter. We have now to observe that rights coming under the general head of property may be created by division into fragments, if I may so say, of the permanent right of exclusive use of some material thing. Such division may arise, in the first place, by mere limitation in time of the right of exclusive use; which will, of course, involve a corresponding limitation of the right to alienate or bequeath, and a withdrawal of the right to destroy or to deteriorate, except so far as some degree of deterioration is involved in the normal use of the thing. In the case of moveables generally, this is the only division of utility which can, from the nature of the case, be conveniently introduced; but in the case of land, certain special uses and advantages may be, and frequently are, secured separately to individuals who do not own the remainder: such as right of way, right of hunting or fishing on the land of another, right of pasturing, digging turf, etc. In the historic process of gradual change from common to private property in land, several such rights came into being in England, as relics of a general right to share the utilities of land incompletely appropriated, which custom secured in each case to the inhabitants of a certain district. But in the modern community that we are now contemplating as organised on the individualistic principle, such a separation of utilities would only arise by consent, except in the case of utilities which it is clearly to the advantage of the community to reserve to the public: such (*e.g.*) as rights of way.

[1] This case of land reclaimed from water has a special theoretical interest, as illustrating the limits of Individualism, from a utilitarian or economic point of view. See Chap. x.

Another important class of rights of property, in which the objects appropriated are not material things, are those rights to non-imitation, by which the results of intellectual labour are protected; whether these results are of the nature of technical invention, secured by patent, or literary products secured by copyright. As I have already said, though the legal interference with the actions of other men required to protect these rights is of a very peculiar kind, it seems undoubtedly reasonable, on the individualistic principle, so far as it is indispensable for giving the needed security, and limited to results at which the persons prohibited from imitation could not possibly have arrived by independent effort. But in the case, at least, of patents, it is very difficult to prove this impossibility. "It is almost always within the limits of human probability that in protecting a technical invention we may be preventing the use of a similar invention which might otherwise have been made by some one else; indeed such coincidence of inventions may even be said to be positively probable, wherever several ingenious minds are simultaneously pondering over the best method of meeting some definite technical need."[1] Hence patents generally must, I think, be regarded as involving some chance of encroachment on the opportunities of others, which must be supposed to increase as time goes on; and this seems a valid argument, from an individualistic point of view, for limiting the duration of this kind of property. In the case, however, of literary products, this difficulty is to a great extent absent; it arises only, if I may so say, on the *margin* of the right, in considering the exact degree of resemblance which ought to be held to constitute an infringement of copyright. There can be no encroachment on the opportunities of others in a prohibition to reprint *Hamlet;* though it may be doubtful how far, if the copyright of Shakespeare's plays were in force, another treatment of the same plot ought to be interfered with. For this reason, any limitation of the duration of copyright to a period falling short of the author's life is not defensible on individualistic

[1] *Principles of Political Economy*, book iii. chap. iv. sect. 6.

principles; and even the limitation actually established in our own and other systems of law, by which copyright ceases at a certain time after the author's death, requires a special utilitarian justification: since the mere fact that the utility produced by a certain kind of labour cannot be adequately protected without legally prohibiting imitation, is not in itself a reason why such utilities should be less completely or permanently at the disposal of the labourer.

There are several other kinds of rights besides those discussed, which are commonly regarded as rights of property. Indeed, for ordinary purposes, any right that is both valuable and transferable may properly be so regarded, as being substantially equivalent to a certain amount of material wealth. Of these the most important class—and the only class, besides those already mentioned, that would exist under a strictly individualistic system—are the rights arising out of contract, to be discussed in the next chapter; among which debts of money are the most important. It should be further observed that, from an economic point of view, we may properly count as a part of a man's wealth a habit or tendency of action on the part of others which is in no way protected by law: as (*e.g.*) the so-called "goodwill" of a business, which is to a certain extent transferable, and therefore saleable. The only political question of importance that arises with regard to this species of private wealth is how far Government can rightfully diminish or destroy it without compensation, by some action otherwise legitimate.[1]

§ 6. Hitherto I have been treating of things that have not yet been appropriated. Whatever has once become property usually continues in this condition, so long as it has any value; being transferred, as we have seen, by sale or gift during life, or through inheritance at death. In exceptional cases, however, it may happen that what A has thrown away as useless may be thought useful by B; if this is the case, it is obvious that B should be allowed to appropriate it.

We have now completed our survey of the chief modes

[1] See Chap. xii.

of legally acquiring rights of property,—apart from transfer, by consent, and succession through bequest or intestate inheritance, with which the two following chapters will be concerned. But an important question still remains. Suppose a man is found dealing with a thing as his own without being able to prove that he has ever legally acquired property in it: what is to be his legal position? When we consider the numerous ways in which evidence of legal title may accidentally fail, it becomes evident that, for the sake of peace and security, the actual possessor of anything must be recognised as having the rights of a proprietor, unless there is positive evidence to show that it legally belongs to some other person or has been wrongfully withdrawn from public use. And, for the sake of security, to free men from the apprehension of unknown claims at any time arising, it is necessary to go further, and recognise the claim of ancient *bonâ fide* possession, even against a title of a different kind, after a certain interval of time has elapsed during which no assertion of this other title has been put forward. How this limit of time should be defined cannot be precisely determined by general considerations: we can only say that an interval should be taken, sufficiently long to leave ample time for the assertion of claims in ordinary cases, but not longer than is required for this purpose.

So far I have supposed the possession to be *bonâ fide*. Generally speaking, this condition should be strictly maintained, since there is no sufficient reason for ever putting an end to the insecurity of a consciously wrongful holder of property: if such a person desires the peace of an honest man, he should confess and repair his wrong. Only sometimes after revolutions or civil disorders even ill-gotten gains have to be guaranteed to the possessors for fear of too widespread apprehension leading to a renewal of the disorder.

NOTE.—The difficult question whether a good title should ever be allowed to arise by transfer out of a bad one—as in the case of an innocent purchaser of stolen property—will be discussed in a subsequent chapter.

## CHAPTER VI

### CONTRACT.

§ 1. In a summary view of the civil order of society, as constituted in accordance with the individualistic ideal, performance of contract presents itself as the chief *positive* element, protection of life and property being the chief *negative* element. Withdraw contract—suppose that no one can count upon any one else fulfilling an engagement—and the members of a human community are atoms that cannot effectively combine; the complex co-operation and division of employments that are the essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates — gifted with mature reason, and governed by enlightened self-interest. Of such beings it is *primâ facie* plausible to say that, when once their respective relations to the surrounding material world have been determined so as to prevent mutual encroachment and secure to each the fruits of his industry, the remainder of their positive mutual rights and obligations ought to depend entirely on that coincidence of their free choices, which we call contract. Thoroughgoing individualists would even include the rights corresponding to governmental services, and the obligations to render services to Government, which we shall have to consider later: only in this latter case the contract is tacit. According

to this view, an enlightened Englishman is a person who resists the

"Temptations
To belong to other nations,"

because the Government of his country gives him a fairly good bargain in the way of governmental services, including enjoyment of public property; in return for which advantages he has tacitly undertaken to pay the taxes that Parliament determines, serve on a jury if required, become a special constable if called upon in case of a riot, and otherwise render to Government such services as the law enjoins. This doctrine I do not now examine; I only refer to it to show the far-reaching importance of the notion of contract in the individualistic view of the organisation of society.

What we have now to do is to discuss the chief conditions by which the legal enforcement of ordinary civil contract has to be restricted, in order that the function assigned to it in the individualistic ideal of society may be performed most effectively, and with least attendant mischief. But, before we proceed to this, we must notice an ambiguity in the meaning of the term contract; which, from the jurist's point of view, is of fundamental importance. In its widest sense the (legal) term contract denotes any act in which "there is a concurrence of two or more wills in producing a modification of the legal rights of the parties concerned."[1] It includes, therefore, those transfers by consent of property in material things, of which we took note in the preceding chapter; which, of course, affect not only the mutual legal relations of the contracting individuals but their relations to other members of the community. "Thus, if a man goes into a shop and buys a watch for ready money, a contract has taken place. The watchmaker and his customer have united in a concordant expression of will, and the result has affected once for all their legal rights." Previously to the transaction all other members of the com-

[1] This quotation, and those which follow in this section, are taken from Professor Holland's *Jurisprudence*, chap. xii.

munity were generally bound to abstain from handling the watch without the watchmaker's consent, and to compensate the latter for any injury that might be caused to the watch through their negligence; henceforward it is the customer whose consent is required, and to whom compensation will be due. In short, the agreement of these two persons has affected what jurists call their "rights *in rem*;" *i.e.* rights corresponding to obligations imposed on other members of the community generally.

But in its narrower and more usual sense the word contract denotes an agreement that only confers what jurists call a "right *in personam*;" *i.e.* a right corresponding to an obligation imposed only on a particular individual. *E.g.* "Suppose that instead of the instantaneous sale of the watch, the agreement has been merely for its purchase at a future day," in this case there is a contract that does not transfer the ownership of the watch, but merely imposes on the watchmaker an obligation to sell the watch at the time and for the price agreed upon, and gives the customer a corresponding right, capable of being enforced against the watchmaker, but not directly affecting his legal relations with other persons.

Now, from the point of view of formal jurisprudence the difference between agreements that give rise to rights *in rem*, and those that only give rise to rights *in personam*, is doubtless fundamental. But in a general discussion of the functions of government, the distinction appears to me to have only subordinate and secondary importance. We have already had occasion to notice that if rights *in personam* are valuable and transferable, they come to be regarded for practical purposes as a kind of property: under ordinary circumstances, my control over "money in the bank" being practically as complete as my control over money in my purse, I naturally think of the two "moneys" as property of the same kind though differently situated: it is indifferent to me that in the former case my legal right only consists in an obligation imposed on the banker to pay me coin or bank notes

on demand, while in the latter case the world at large is under an obligation to refrain from meddling with my sovereigns. And, speaking more generally, we may say that, from our present point of view, the resemblances between (1) sale or other agreement by which *property* is transferred, and (2) an agreement giving the legal right to a future service, are more important than the differences. In the most important cases of either—and those to which our consideration may conveniently be limited in the first instance—there is a transfer of utility, from A to B, in view of a corresponding transfer of utility on the other side; and not only are the general grounds of expediency for giving legal force to such agreements mainly the same in both cases, but the special conditions under which it is inexpedient to give them such validity are also to a great extent identical.

It will, therefore, I think, save trouble and tend to give a clearer grasp of the subject if we first direct attention to the conditions of valid exchanges of utility which are common to the two cases—transfer of rights of property and engagements to render services. I shall then consider the conditions peculiar, from the nature of the case, to agreements to which the term contract is more ordinarily limited; *i.e.* in which the utility which one of the parties agrees to transfer is a *future* service.

§ 2. Let us begin, then, by considering the conditions and limitations that apply equally to both kinds of agreements; —those that modify the rights *in rem* of the parties, and those that merely give rise to rights *in personam*. The general rule, summarily stated, is, that legal validity should be given to all exchanges of utility (1) deliberately made between persons possessing at the time mature reason, if they have been made without (2) coercion, or (3) wilful or careless misrepresentation on either side; and (4) if the effects they were designed to produce involve (*a*) no violation of law or (*b*) cognisable injury to the community. There is a general presumption that the carrying into effect of agreements made under these conditions will involve an

increase of utility to the parties agreeing, without causing mischief to others; this follows from the general individualistic principle that a sane adult can on the whole be trusted to look after his own happiness if secured from interference of others. But if any of these conditions is not fulfilled, the presumption so far fails, and there is a *primâ facie* ground for interfering to prevent or modify the agreement, or allowing it to be invalidated in whole or in part; so far as this can be done without disappointing the legitimate expectations of persons other than those who made the agreement. Let us examine more closely the different kinds of conditions.

The first condition, that the agreeing parties should be at the time in possession of mature reason, excludes—or at least sets aside for further consideration—the agreements of the three following classes of persons: (1) those who have not yet come to the full use of reason; (2) those who have lost it for an indefinite period through disease; and (3) those who have transiently lost it through intoxication, or some similar cause. It does not follow that all such agreements should be incapable of being legally enforced:—*e.g.* there is a manifest expediency in the regulation that minors should be legally capable of making contracts of a kind clearly beneficial to them. But there is in all these cases *primâ facie* need of some limitation of the general rule of enforcing agreements: since the intellectual condition of one of the parties concerned precludes any general presumption that the agreement will be for the advantage of both.

Our second condition was that exchanges of utility, to be valid, should be made without coercion. Here the term "coercion" requires careful definition. So far as it merely means *illegal* coercion—*i.e.* actual or threatened violation by one party of the other's legal rights—the condition presents no difficulty: it is manifestly inexpedient, generally speaking, that the law should supply inducements to illegal conduct by interfering to secure advantages to the law-breaker.[1] But suppose A induces B to enter into an agree-

[1] I do not know why—as is commonly said to be the case in English law—

ment by threatening some act or omission which is not illegal or in itself immoral, but which will as a matter of fact be seriously annoying to B, while it is not conducive to A's interests otherwise than by enabling him to obtain B's consent to the agreement, and certainly would not have taken place except for A's desire to obtain it: Is there an adequate reason for invalidating such agreements, or interfering to prevent them from being made? The question is not easy to answer decidedly: since, on the one hand, it is obviously desirable to prevent pressure of this kind, so far as this can be done without causing mischief in other ways; on the other hand it seems difficult to prevent it in any complete way, without seriously interfering with the freedom of persons to declare intentions in themselves innocent.[1]

It is a different question again whether the law should interfere to prevent a contract in which A gains by the distress of B, even though A is in no way responsible for the distress nor legally bound to relieve it. Such a contract, in popular political discussion, is sometimes said not to be free; but it seems clear that, on the individualistic principle, there is no ground whatever for interfering to prevent it, if it be granted that we have the ordinary reasons for assuming that B is in a better position than he would have been apart from the contract. If A is not legally bound to help B merely because he is in distress, and if he is free to contract or not as he likes, I see no consistency in legally obliging him to make a contract—if he does make one—more favourable to B than he would make without legal interference. Such interference, in fact, is essentially socialistic. I do not

the "duress" that renders a contract voidable is confined to "actual or threatened violence or imprisonment;" and does not include the threat of irreparable injury to property. I can find no justification for this restriction. The rule in the Indian Code is wider and more reasonable.

[1] The "Undue influence" which renders a contract voidable, according to English law, seems in some cases to include pressure of this kind, at least according to the dicta of the Judges. But I am informed that these dicta go beyond the decided cases; which do not support the general proposition that an agreement obtained by "pressure" is invalid, if by "pressure" is meant expressed intention of doing something lawful but injurious to the other party.

therefore say that it may not be sometimes expedient: but it cannot, I conceive, be defended on the ground that B is "not really free," in the sense in which individualistic legislation aims generally at securing his freedom.

§ 3. Let us now examine the third of the conditions above mentioned: that there must be no wilful or negligent misrepresentation of material facts. We have to observe in the first place that though there is a general presumption that exchanges freely made between persons in the possession of mature reason will be for the advantage of both parties, experience continually shows us cases in which an exchange of utility has actually been disadvantageous to one of the parties, owing to an erroneous idea of the value of the thing or service bargained for. The question then arises how far the law should interfere to prevent or repair this disadvantage. Now it is obvious that if a seller's erroneous idea of the value of a purchased commodity, even when shared by the buyer, were broadly held to be a ground for treating the transfer as substantially invalid, the insecurity thus introduced into agreements would be so widespread as to be intolerable: no purchaser (*e.g.*) of a picture would ever know whether the exchange was really completed or not. The only question that raises any doubt is, whether A should not be bound to disclose all material facts *known* to *him*, which are such as would affect B's judgment, if he knew them, supposing B to be a person of ordinary common sense. I think that our first impulse would certainly be to affirm that he ought: but reflection seems to show that if the knowledge was of a kind that it was equally open to B to acquire, each party ought, on the individualistic principle, to have the whole advantage of his own knowledge, and to bear the whole loss arising from his ignorance,—provided that his mistake is not caused in some positive manner by the other party to the agreement. And even when—as in ordinary cases of sale—the seller may be supposed to have superior knowledge of the qualities of the articles sold to the buyer: still it is *primâ facie* in accordance with the principle of mutual non-interference that each should

be left to ascertain unaided the adaptation to his own needs and desires of the thing or service that he transfers or receives in exchange. Hence, except A's error is due to wilful or negligent misrepresentation on B's part, there seems to be no reason, from the individualistic point of view, for making B responsible for it.

There are, however, certain kinds of exchanges, in which one of the parties is generally placed at an obvious and marked disadvantage as compared with the other, in respect of his means of acquiring knowledge upon the subject to which the agreement relates: in which, therefore, there is a special utilitarian argument for giving him legal security that the statements on the other side are not only full as far as they go, but substantially complete. In such cases, then, there is strong ground for making a special regulation that even innocent non-disclosure of material facts should impair the legal validity of the agreement.[1] And there is a different class of cases in which concealment of material facts seems to be a reasonable ground for allowing an exchange to be invalidated: *i.e.* when the exchanging parties stand in a special relationship (*e.g.* solicitor and client, or ex-guardian and ex-ward), in which A would naturally suppose B to be advising him for his (A's) own good. Still, in either of these cases, the reason for invalidating the agreement seems hardly consistent with the fundamental individualistic assumption that government may safely leave a sane adult to take care of his own interests.

Putting aside these special cases, we may say that the only adequate ground for invalidating exchanges of utility freely made between persons in possession of mature reason, which turn out disadvantageous to one of the exchangers through his ignorance of material facts is, that this ignorance has been

[1] The special contracts placed under this head in English law are of three kinds:—

(1) Contracts of marine and fire insurance.

(2) Contracts for the sale of land.

(3) Contracts for the allotment of shares in companies.

In Roman Law the principle of "caveat emptor" was overruled in respect of "vitia latentia corporis," wh ch the seller was bound to disclose.

caused by the other party to the exchange in some active or positive manner, and not merely negatively through non-disclosure. Here, however, a further limitation seems necessary, to avoid a degree of interference that would do more harm than good. It seems inexpedient to lay down that every misleading statement made by one of the exchangers, which has in any way contributed to induce the other to enter into an agreement disadvantageous to himself, is to invalidate the agreement or give a legal claim to reparation: to lay this down would hamper too much the general freedom of conversation between human beings, whenever there was a possibility that the conversation might ultimately lead up to an agreement.[1] So far, then, as *innocent* misrepresentation is concerned, it seems sufficient to provide that each party to an agreement should be responsible for the truth of any statement that substantially formed a part of the agreement, *i.e.* any statement upon the truth of which it was understood by both sides to be conditional.

The case is different where there has been a demonstrable intention on one side to deceive the other: all kinds of acts prompted by such intention, if actual mischief to the person deceived follows, are undoubted violations of the principle of non-interference, and should be legally repressed. And it seems reasonable to extend the notion of "deceptive acts," to include cases in which the act itself, that caused or contributed to the erroneous belief of the other party, was not designed to deceive, but in which the erroneous belief caused by it was known to the agent and allowed by him to remain uncorrected.

§ 4. Finally, we laid down that the expediency of legally recognising the validity even of agreements apparently advantageous to both the contracting parties was limited by the

[1] Another important reason for this limitation is suggested by Sir W. Anson, who says (*Law of Contract*, pt. ii. ch. iv. § 2): "The process of coming to an agreement is generally surrounded by a fringe of statement and discussion, and the Courts might find their time occupied in endless questions of fact if it were permitted to a man to repudiate his contract, or bring an action for the breach of it, upon the strength of words used in conversation preceding the agreement."

condition that the effects which the agreement was designed to produce involved (*a*) no violation of law, and (*b*) no cognisable injury to the community. By the first of these two conditions it is not merely meant that the execution of any promise legally enforced must not involve a violation of law—it would, of course, be absurd that an otherwise illegal act should become not only legally permissible but even legally obligatory, merely because the agent had expressly undertaken to perform it. The more important part of my meaning referred to cases in which the promise which there is a question of enforcing, is not itself illegal, but in which the prospective illegal conduct of the other party to the contract constituted the whole or part of the inducement to make the promise: in such cases to give legal validity to the promise is obviously objectionable, as affording indirect encouragement to the doing of illegal acts. In itself it is quite lawful for me to give a ruffian a £5 note; but if, having promised to give him £5 if he would horsewhip my enemy, I were compelled by law to fulfil the promise, the law would be indirectly serving to increase the inducements to illegal horsewhipping.

The ground of the second limitation (*b*) is not quite so easy to see. If, it may be said, there are any acts so injurious to the community that promises to perform them —and even contracts made in consideration of promises to perform them — ought not to be enforced, how comes it that such acts are not prohibited by law? The answer to this question will be better understood when I come to consider the different modes and degrees of governmental interference for the prevention of mischief, and the different drawbacks that attach respectively to these different modes and degrees. I shall there point out that the kind of governmental interference which consists in refusing to interfere—of which the refusal to recognise contracts is one species—is not open to some of the objections that may be urged against interference by direct legal prohibitions and penalties actively enforced by law courts: there may, therefore, be a margin of conduct harmful to the

community which may expediently be prevented by the former milder mode of interference, though it would do more harm than good to repress it by the latter more intense method.

§ 5. In the last two paragraphs we have had chiefly in view contracts in the narrower and more usual sense of the term —*i.e.* agreements to perform future services. Let us now consider certain further limitations on enforcement, peculiar to agreements of this kind.

In the first place, before the time has arrived to render the service agreed upon, it may have become impossible or illegal to render it. On whom should the loss through this non-performance fall? Let us first take the case of physical impossibility. Generally speaking, it would seem that the person who undertakes to perform a service ought to ascertain before undertaking it whether it is in his power to perform it, just as the recipient ought to ascertain whether it is worth while to pay the price asked: using economic terms we may say that the *promiser's* business is to know the conditions of *supply*, while the *promisee's* business is to know the conditions of *demand*. So that, if the subsequently manifest impossibility is one that might have been foreseen, the promiser should be held responsible for damage through non-performance. In many cases, however, it is either implied in the language used, or may be assumed from the nature of the case, that it was the intention of both parties that the promiser should be only bound to perform if performance be possible. For instance, in contracts to render artistic services requiring special physical qualifications — such as singing — for a certain payment; just as it may fairly be assumed on the side of the purchaser of the service that what he intended to bind himself to remunerate was not merely the performance of certain actions, but the production of certain aesthetic effects by means of them; so, it may be assumed on the other side, that it was not intended that the artist should be considered to have failed to perform the contract, if, at the time fixed he is physically disqualified from producing the desired

effects. Perhaps a similar limitation of intention may be assumed in the case where the performance of a contract becomes illegal through change in the law. At any rate, it seems clear that the liability arising out of a promise should cease in such a case: it is burden enough in a modern civilised community to be legally assumed to know the law as it is: it would be intolerable if one also had to know what it is going to be a year hence.

But without *impossibility*, the performance of a compact may become (b) through change of circumstances—indefinitely more inconvenient to the promiser than it is advantageous to the promisee. Suppose I undertake to-day to sweep a man's chimneys for a year, and to-morrow a rich uncle dies and leaves me a million: there would be an obvious balance to unhappiness in holding me to my contract. What is important, from our present point of view, is, not that promises should be kept, but that the recipients of promises should not suffer from their breach. Thus, generally speaking, in our law—and I believe in other systems—the most that is aimed at is the provision of compensation for breach of contract, when the contract relates not to the transfer of property but to personal services of any kind. Thus, practically, as was before said, the legal obligation arising out of such contract is merely the obligation to pay a sum of money if it proves inconvenient to fulfil the contract. But there is in all modern systems of law a far more important limitation on even the payment of debts of money, which individualist writers do not seem to me to take sufficient pains to justify. Such debts cease to be legally due from what we call "discharged bankrupts"—*i.e.* persons who have proved their inability to pay and given up their property for division—however rich they may have become since their bankruptcy. The utilitarian justification of this arrangement is, that the relief from debt thus given is generally necessary to restore to a bankrupt the stimulus to useful industry which an indefinite prolongation of his pecuniary liabilities would take away; and that the

relief involves no material sacrifice of the interests of creditors, since, even if their claims were kept legally valid, they would still have no effective means of compelling the defaulting debtor to earn the funds required to satisfy them. I admit the general force of this reasoning, but I think that its application requires to be very carefully guarded, to minimise the danger of encouraging reckless industrial adventures; and that a bankrupt who has not paid his debts should remain in a position of marked social inferiority.[1]

§ 6. So far I have examined the conditions under which legal validity should be given to agreements in which both parties receive some utility. It will be evident that the limitations expedient in this case should also be applied—so far as they are applicable—to one-sided transfers of utility: but it may be questioned whether the legal enforcement of agreements of this latter kind should not be still further limited; since there is obviously not the same *primâ facie* ground for considering the agreement advantageous to both parties. Still it would clearly interfere with freedom of action if A were not allowed to transfer property to B, merely because there was no commodity or "valuable consideration" received by him in return; and it does not at first sight appear why he should not be compelled to render a service to which he has voluntarily bound himself under similar circumstances. There is, however, in our law, a provision that there must, generally speaking, be valuable consideration to make a promise enforceable, unless it is made with special formalities; and this provision seems to be approved by the most esteemed living writers on this branch of law. Apparently it is thought that persons should be able to bind themselves by gratuitous promises, but that some special solemnity should be required (1) as a protection of the inconsiderate, and (2) as evidence of the fact that the promise was really made —"preappointed" evidence. The former argument is

[1] I think (*e.g.*) that he should be deprived of all political franchises; and that his legal immunity should depend on his name being kept in a register open to public inspection.

obviously an introduction of the "paternal" principle; but there seems to me to be force in the latter, from our present point of view, owing to the greater difficulty, in the case of such one-sided promises, of distinguishing a statement of a benevolent intention, not intended as a pledge, from a promise really understood as such on both sides. Still, on the individualistic principle, it seems clear that any adequate evidence of a one-sided promise ought to be accepted, and that it ought to be as valid as a contract in which an exchange is made,—that is, if we are merely considering the claim arising out of such a promise as a single and separate claim. It is another question whether we should enforce a two-sided promise rather than a one-sided one, if we have to choose between the two; *e.g.* as against an insolvent estate, whether a gratuitous promise should be allowed to rank along with promises given for value. Here, I think, we should certainly decide in the negative on utilitarian grounds: it is much more important that men should rely on bargains than that they should rely on one-sided promises —not to speak of the need of providing that persons practically insolvent should not be able to create "friendly" creditors: on similar grounds it is necessary to invalidate even gifts of property made by persons who cannot pay their debts.

§ 7. I will now notice a special operation of contract which is important as determining a modification of ownership. When we were examining the general desirability of securing to individuals the right of exclusive use of material things, the question might have been raised: Why appropriate to individuals? Productive labour, under modern industrial conditions, is usually the labour of many co-operating. Why not allow appropriation to the whole group? And the answer clearly is that we ought to allow this, provided the group is so organised as to act collectively; otherwise the appropriation of matter to a number of persons would be too indefinite, and would obviously give occasion for conflict in management and enjoyment. When we go on to ask how such a group capable of collective owner-

ship is to be organised, the individualistic answer is again clear: viz. that it should depend on free contract among the members of the group, because men in general can determine on what terms they can combine better than government can determine for them. If such collective ownership is to be useful it must carry with it the capacity of being the subject of rights arising out of contract; and, obviously, the corporate body or "artificial person" who possesses these rights must equally be the subject of contractual obligations, and obligations attaching to property. But a little reflection will show that obligations can only be to a limited extent transferred to such an artificial person by the real persons comprising it. It is evident that such persons cannot be allowed to diminish their general responsibility for the observance of the rights of others; it would be absurd that by any compact among themselves they should be able to contract themselves out of prior legal obligations to other men; therefore, if anything is done in the name of an artificial person, by which such obligations are violated, the individuals who do it must be liable as such.[1]

The case is different with obligations arising out of contract: it is clearly in accordance with the individualistic principle that a group of persons should be allowed to contract on the basis of "limited liability," provided this is clearly

[1] An exception to this rule may reasonably be made in the case of the secondary and indirect liability which a company—formed on the basis of limited liability—may incur for the acts of its employees. In this case the limitation of liability may fairly be allowed to hold good for liabilities *ex delicto*, as well as for liabilities *ex contractu*. The *rationale* for this exception is, that the extension of liability from agents to principals is hardly justifiable without some straining of the conception of negligence. If I am run over by a cart negligently driven by a servant of a railway company, it is possible that the directors of the company may have been somewhat remiss, either in employing a careless driver or in not sufficiently impressing on him the duty of careful driving: but it is very likely that they are not to blame at all, in which case there is some hardship in making the company liable for damages; —although it may be on the whole expedient to do this, owing to the great difficulty of obtaining positive proof of this kind of remissness on the part of employers, even when it has actually occurred. Hence I may think myself fortunate, in the case supposed, that I have any one to sue except the driver of the cart: so that I have no reason to complain of the limitation of the liability of the shareholders.

understood by the other party to the contract, since the latter can always decline to enter into the contract if the security seems insufficient. In short, on the individualistic principle, the only legitimate end with which legal restraints can be imposed on the formation of corporations capable of holding property and making contracts is that of securing clear intimation of their formation to the rest of the community, and clear distinction between their acts and the acts of the individuals composing them. Some part of our actual regulation of joint-stock companies is clearly designed to realise this end, and is therefore simply individualistic; though other rules can only be interpreted as intended to protect the ordinary members of the company against the mischievous consequences of leaving too much to their directors.[1]

[1] Such rules belong to the species of governmental interference, which I shall discuss in Chapter viii., as "indirectly individualistic" or "paternal."

## CHAPTER VII

### INHERITANCE

§ 1. THE right of Bequest, and the title to property arising out of it, comes naturally to be considered after the rights arising out of contract. Indeed, a bequest made and accepted under conditions may be regarded as a kind of contract between the dead and the living. It follows that bequests should only be treated as valid under limitations generally similar to those which we have minutely examined in the case of contract; *i.e.* they must be liable to be invalidated, in whole or in part, by the absence of mature reason, or the presence of coercion or deception. It has to be observed, however, that where bequest operates some fresh legal intervention would be necessary, whether there was a bequest or no; since it would be manifestly inexpedient that the wealth left by a dead man should be liable—like things thrown away during life—to become the property of the survivor who seized it first. There must therefore be in any case a Law of Intestate Inheritance: and it might seem simpler to consider first the plan on which such a law should be constructed, before proceeding to discuss the conditions under which bequest should be allowed.[1] But, on the whole, it seems to me better to adopt the opposite order; since, when wills are allowed, any rules deviating widely from normal customs of bequest would tend to cause painful disappointment of expectation: hence the regulation of in-

[1] This is (*e.g.*) the order in which Bentham (*Civil Code*, Part ii. chapters iii. and iv.) deals with the two questions of "Wills" and "Intestate Succession."

testate succession will reasonably be determined, to some extent, on different grounds, according to the nature of the restrictions placed on the right of bequest.

To many Englishmen at the present day the right not only of *distributing* wealth after death, but of ordering the details of its use for all time, seems to be naturally and almost necessarily included in the Right of Property—that is, if the wealth has been acquired by the owner and not given or bequeathed to him under conditions. In fact, however, the right of free bequest is of comparatively late growth in the development of society; and it is important to note this, as an explanation of the extent to which the freedom of bequest is actually restricted by law even in advanced modern communities, and is controlled by custom and opinion where it is not legally limited. As Maine has pointed out,[1] "in all indigenous societies a condition of jurisprudence, in which testamentary privileges are not contemplated," precedes that in which free testation is permitted. "The unit of ancient society is the family"[2] or clan; and even where, as in Rome, the Paterfamilias is regarded as sovereign of the family, and absolute administrator of its property during his life, he yet has, during a considerable period of history, no control over it after his death. Indeed, according to Maine's conjecture, the main original use of wills in Rome was not to override, but to satisfy the natural claims of the family; by modifying the archaic rule of "agnatic" succession which intestacy brought into operation, and which—as it excluded females and enfranchised sons—was intolerable to parental feeling. In mediæval law, again, we find that liberty of bequest was at first closely limited by the rights of the testator's widow and children. "The power of diverting property from the family, or of distributing it capriciously, is not older than the *later portion* of the middle ages. . . . When modern jurisprudence first shows itself in the rough,"[3] wills are rarely allowed to interfere with the right of the widow to a definite share, and of the children to certain

[1] *Ancient Law*, p. 177. [2] *l. c.* p. 126. [3] *l. c.* p. 224.

fixed proportions, of the common inheritance.[1] And similar restrictions are actually maintained in the French Civil Code and several other legal systems; partly owing to the remarkable persistence of the older view of family rights—when so much of less ancient origin was swept away in the revolutionary era—but partly, no doubt, from the desire to prevent the inequalities resulting from primogeniture.

I have allowed myself this brief historical digression, because it is almost required to explain the peculiar position which this point in the individualistic scheme occupies at the present day.

Freedom of Bequest, on the one hand, has not completely emancipated itself from the old traditional restraints handed down from patriarchal times; and, on the other hand, it is assailed by new limitations, from a modern socialistic point of view.

I propose to consider the argument for each kind of restriction in turn. First, however, I must briefly recall what was before said on the general question of restricting at all. I noticed that Bequest occupies a somewhat different position from other rights included in our common conception of the Right of Property, when the question of allowing it is regarded from the individualistic point of view: the consideration of it seems to lead us to an "antinomy;" a pair of irresistible arguments on either side of the question. It seems on the one hand that other men can have no right to a dead man's property, so far as its value is due to his own labour, or the labour of men whose free choice has transferred it to him—since it would not have been there at all but for him or them: and, on the other hand, it seems that the dead can have no right to control men's use of a material world to which they no longer hold any cognisable relation. As I have before said, neither side of the argument admits of a satisfactory answer, so long as mutual non-interference is taken as an ultimate end; but, from a utilitarian point of view, the argument

[1] These limitations are, no doubt, derived from the Roman Law: but they may be assumed to have been in harmony with mediæval sentiment.

against the right of bequest seems to be outweighed by the considerations (1) that such a right is needed to give adequate inducement to industry and thrift in the latter part of life; and (2) that practically any seriously annoying limitations on this right would be likely to cause extensive evasions of the law by gifts before death. But these considerations, though they appear to me decisive in favour of *some* freedom of bequest, do not clearly negative the imposition of greater restrictions on bequests than we think it expedient to impose on a man's power of transferring property during his life. And at any rate an individualist may admit such restrictions, in the interest either of the testator's family or of the community, without a palpable abandonment of his fundamental principle.

§ 2. Let us consider first restrictions in the interest of the family, as being the older: and, for the sake of definiteness, let us suppose such a plan of restriction as that adopted in the French code. Suppose that a man's property, if he has three or fewer children, is ideally divided into equal shares exceeding by one the number of his children, only one of which he is free to bequeath away from them: while, if he has more than three children, he is free to bequeath away from them one-fourth of his property, but no more: as regards the rest, he cannot deprive any child of its equal share, unless for special causes judicially proved.

Against such a measure as this I should argue that, granting it to be desirable that a man's property in a general way should go to his children, the testator evidently has special means of ascertaining his children's wants and deserts, and that any variations from equality of distribution which he may be induced to make, if free bequest is allowed, are likely on the whole to correspond to variations either in their wants or their deserts. On the other side it is urged that the disinheriting of children is liable to give a painful and undeserved shock to reasonable expectations: and no doubt cruel disappointments may thus be caused. But similar mischief may be done in other cases by the tacit encouragement, without any definite and provable promise,

of expectations of gift, bequest, or other aid: and in such cases it is generally recognised that the repression of wrong must be left to morality, since law can only protect expectations arising out of definite and demonstrable engagements. And if it be thought that in the present case some special legal interference is needed, owing to the strong support that common opinion gives to the expectations of children to inherit their parents' wealth, it would be easy to prevent the shock of disappointment by requiring a parent who wished to retain his freedom of bequest to notify this to his children before they attained a certain age. The real issue therefore is not whether the disappointment of expectations of inheritance should be prevented, but whether the law should intervene to create such expectations. I cannot conceive any individualistic justification for such interference, so far as it provides that a number of human beings, after being properly educated, should not have to depend on their own exertions for subsistence: but it clearly accords with the individualistic principle to secure to all children support and proper training until they can provide for themselves, and to limit the power of bequest so far as is necessary to secure this result.

§ 3. So far I have considered the bequest simply as having the effect of dividing the property among children—or other persons—who receive it in complete ownership. Suppose, however, that a child or grandchild is an infant at the parents' death; it is obvious that the property must be given to some one to hold in trust for it. We thus introduce the notion of *fiduciary* as distinct from *beneficiary* ownership; in which the management of property is separated from the enjoyment of it. The necessity for such trusts in the case of young children is obvious: but when we consider the expediency of allowing fiduciary ownership to be extended beyond what is required for this purpose—as (*e.g.*) by permitting parents to pass over children and bequeath property to be held in trust for descendants yet unborn—the conclusion, from our present point of view, is more doubtful. On the one hand, there is the general argument for freedom

of bequest as encouraging industry and thrift in old age: and in some cases there would be a difficulty in arranging the succession to property in accordance with the testator's view of the needs and deserts of his descendants, unless such remote trusts were allowed. On the other hand, fiduciary ownership involves the drawback that a trustee cannot be expected to be as much interested in the management of property as an ordinary owner would be: while, if he is controlled by conditions imposed by the testator, there is the further objection that the testator's foresight of the future is limited, so that after his death an arrangement manifestly undesirable may be legally unalterable. This latter objection applies with especial force to property left to public objects: if the testator's design is carried out it may become worse than useless, owing to change of circumstances, even when it was originally well conceived.

Similar questions arise as to the expediency of allowing ownership that is not fiduciary, but limited in time or restricted by conditions, to be created by bequests,—or any legal act that continues to take effect after the death of the person imposing the limitations or conditions. *E.g.*, when a man thus becomes an owner of land for life only, he is likely not to have sufficient inducement to apply capital in improving the land: and the inalienability necessarily involved in such life-ownership may keep the land in the hands of a person who has neither skill nor capital to deal with it in the best way.

These and similar difficulties are only particular cases of the general theoretical difficulty that besets the individualistic system, if it is taken to include freedom of bequest. Granting that men in general will extract most satisfaction out of their wealth for themselves, if they are allowed to choose freely the manner of spending it, it obviously does not follow that they will render it most productive of utility for those who are to come after them if they are allowed to bequeath it under any conditions that they choose. On the contrary, it rather follows from the fundamental assumption of individualism that any such posthumous restraint on the use

of bequeathed wealth will tend to make it less useful to the living, as it will interfere with their freedom in dealing with it. Individualism, in short, is in a dilemma. The free play of self-interest can only be supposed to lead to a generally advantageous employment of wealth in old age, if we assume that the old are keenly interested in the utilities that their wealth may furnish to those who succeed them: but if they have this keen interest, they will probably wish to regulate the future employment of their wealth; while, again, in proportion as they attempt this regulation by will, they will diminish the freedom of their successors in dealing with the wealth that they bequeath; and therefore, according to the fundamental assumption of individualism, will tend to diminish the utility of this wealth to those successors. Of this difficulty there is, I think, no general theoretical solution: it can only be reduced by some practical compromise. Thus the creation of fiduciary ownership for the benefit of young children may be limited by requiring the children to be living when the bequest takes effect, or born within a certain period after that date. Again, the general disadvantages of fiduciary management, and of management by a limited owner—which have been specially noted in the case of land—may be minimised by securing to the trustee or life-owner an inalienable right of selling the land or other property, provided he invests the proceeds of the sale in securities of a certain class.[1] Finally, in the case of trusts for public uses—generally of a permanent kind—it is desirable that the government should have a general power and duty of invalidating useless or mischievous bequests, and of revising and modifying the employment of the funds bequeathed, after a certain interval of time or after any important change of circumstances.

[1] The disadvantage of fiduciary ownership is obviously not great, if the function of the trustee is confined to that of receiving the income of "safe" investments that do not practically require looking after, and investing any annual surplus in similar securities. If, indeed, a very large portion of the capital of the country were in this condition, the industrial progress of society might be hampered by the difficulty of finding capital for new undertakings:—but this danger is hardly within the range of practical politics.

§ 4. The restrictions on free bequest, which the discussion in the preceding section has led me to propose, are such as English legislation has long recognised as expedient. But limitations of a much more sweeping kind have often been recommended by thinkers who would have shrunk from interference with any other of the rights commonly included in our conception of the right of property; and, in particular, by the influential utilitarian writers on whose work the present treatise is chiefly based. In 1793-5, Bentham proposed—in connection with an "extension of the law of escheat," of which I will presently speak—that, in case of failure of near relations, the power of bequest should only extend to half the testator's property.[1] Half a century later J. S. Mill[2] stated that were he "framing a code of laws according to what seems best in itself," he would "prefer to restrict not what any one might bequeath, but what any one should be permitted to acquire, by bequest or inheritance. Each person should have power to dispose by will of his or her whole property; but not to lavish it in enriching some one individual"— even a near relation — "beyond a certain maximum, which should be fixed sufficiently high to afford the means of comfortable independence." It appears to me, however, that any interference with free bequest, so serious as that contemplated in either of these proposals, would dangerously diminish the motives to industry, and—what is yet more important—thrift, in the latter part of the lives of the persons who came under the restrictions. Moreover, any interference running strongly counter to the natural inclinations of such persons would be likely to be extensively evaded by donation before death.[3] Probably all that can be safely

[1] It ought to be said that in the *Traités de Legislation*, published by Dumont in 1802, from Bentham's MSS., this restriction is only suggested in a doubtful and hesitating manner.—See *Principes de Code Civile*, Part ii. ch. iv.

[2] *Political Economy*. Book ii. ch. ii. § 4.

[3] This is admitted by Mill, who consequently thought that "the laws of inheritance have probably several phases of improvement to go through before ideas so far removed from present modes of thinking will be taken into serious consideration."—*Pol. Econ.*, Book v. ch. ix. § 1.

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attempted in the way of limiting bequests in the interest of the community—beyond the regulations proposed in the preceding paragraph—is a tax on inheritance, considerably increased when bequests are received by others than near relations.

§ 5. I now pass to consider how intestate succession is to be regulated. I have before pointed out that the question of intestate succession will tend to be determined in different ways, according to differences in the legal rules and normal habits of bequest; since, where wills are allowed, rules of intestate succession deviating widely from the habits and customs of bequest would be likely to cause painful disappointment. Hence, assuming right of free bequest, we have two distinct principles for determining law of intestate succession; we may either keep as close as possible to the general customs of bequest, or may be guided by considerations of general expediency. But general expediency can, I conceive, lead to no *selection* of heirs outside the circle of those for whom the deceased was either morally bound or naturally disposed to provide. The question, therefore, can only be between distribution within a defined circle and appropriation by the community.

It can hardly be doubted that any gain thus obtainable by the community would be purchased at too great a cost if it involved bitter disappointment to individuals, of a kind calculated to excite universal sympathy;—as would be the case if a man's children or grandchildren lost their inheritance through his accidental intestacy. I do not, however, think that this result would follow from the adoption of Bentham's scheme for distributing intestate inheritance.[1] The chief points in this are:—

(1) That half the common property should go to a widow after her husband's death,[2] and the rest be divided among his descendants, if any; and that, on

1 See *Principles of the Civil Code*, Part ii. ch. iii.

2 Bentham assumes that while the enjoyment of the property of married pairs should be in common, the legal ownership of such property should be vested in the husband.

the decease of a widow, her property shall be similarly divided among her descendants.

(2) That there shall be equal division "by stocks" and not by heads; *i.e.* that if a child dies before his father, leaving children, his share shall be divided among his children in equal proportions; and so of all descendants.

(3) That if a person has no descendants, his property should go to his parents; or, if either parent is dead, to his or her descendants.

(4) That, in default of near relations—as defined by 3—it should escheat to the State.

Here the exclusion of primogeniture and of the rights of cousins and grandparents, involved in recommendations (2) and (4), are to be noted as markedly opposed to existing English law. On both these points J. S. Mill is in substantial agreement with Bentham, only he would press the principle of (4) still further, holding that "no rights should be acknowledged in collaterals, and that the property of those who have neither ascendants nor descendants should escheat to the State."[1] It seems to me that, on account of the relations of affection that normally attach any person to the other descendants of his parents, Mill's proposed rule would, in cases of accidental intestacy, cause painful disappointment to natural expectations. But I think that the actual expectations of remoter relatives are mainly created by the law; and that, if the law were altered, they would not exist, under ordinary circumstances, to any extent worth considering. I think, therefore, that the exclusion of collaterals in case of intestacy—in the milder degree proposed by Bentham—would furnish a legitimate source of revenue to the community, it being understood that any

[1] If all prejudices could be put aside, Mill would like to reduce the share of descendants, in the case of intestacy, to a "just and reasonable provision; that is, such a provision as the parent or ancestor ought to have made; their circumstances, capacities, and mode of bringing up being considered." But he recognises that this suggestion is not within the range of practical politics. See *Political Economy*, Book v. ch. ix. § 1.

hardship that might arise from it in special cases, in which the declared and unrevoked intention of a deceased person had been prevented from realisation by sudden death, might be recognised and remedied by the grant of a share of the inheritance.

On the question of equality of division the considerations that have to be balanced are of a different kind. Equal division of an intestate's property might no doubt cause some disagreeable shock to expectation in England, in the case of large landed estates which are customarily settled on the eldest living descendant of the eldest line. On the other hand, similar disappointment—causing probably more distress—is now liable to be given to small owners of land and houses, who have never intended inequality of division; and this latter class of persons would appear to need the case of the legislator more than the former, as the richer landowners may be more safely presumed to know the actual state of the law at any time, and therefore to guard against the effects of intestacy, if they dislike them.[1] I think, therefore, that the balance of argument is against maintaining primogeniture by law, if we consider merely natural expectations, and leave general expediency out of account. And I do not think that the general expediency of primogeniture has ever been supported, or is likely to be supported, by arguments that individualists could approve. It is chiefly defended on the ground that large landowners are more likely than small ones to manage their relations with tenants and labourers on other than strictly economic principles; but, from an individualistic point of view, this can hardly be regarded as a result at which the law ought to aim.

[1] I suppose that the persons who have land to leave by will, and who wish to "make an eldest son," are an insignificantly small minority: since eldest sons are usually made by settlement *inter vivos*.

## CHAPTER VIII

### REMEDIES FOR WRONGS

§ 1. We have now surveyed in outline the rights which, on the individualistic principle, should be secured by law to private members of the community, so far as they correspond to obligations imposed upon other private individuals. The main positive obligations, as we have seen, are (1) the duty to perform such engagements as have been deliberately made without constraint or culpable misrepresentation; and (2) the duty of parents to support and train children. The other obligations are chiefly negative—to abstain from personal constraint and from acts causing physical injury or serious discomfort to others; from interference with the exclusive use of certain portions of matter, and certain results of intellectual labour; and from certain sources of mental annoyance, especially defamation, and deception that results in mischief; also from interference with the rights involved in the institution of the family.

We have now to consider how the fulfilment of these obligations is to be secured, and how the mischiefs arising out of their non-fulfilment are to be remedied. We must bear in mind that, on the individualistic principle, strictly interpreted, Government is not concerned with the prevention or reparation of mischief, except so far as it is due, directly or indirectly, to the action of other men. It may be that, at a particular time and place, the forces of external nature, irruptions of floods or wild beasts, or flights of destructive insects—are more formidable sources of mischief

than the malice or carelessness of men, and that complex and carefully-arranged co-operation is required to guard against the evils which they tend to produce. But, according to the individualistic principle, it may be doubted whether this co-operation should be compulsory; whether any one should be compelled to join in protecting others from harm which he has not himself in some way positively contributed to cause, either by his own acts or by voluntary acceptance of the responsibilities resulting from other men's acts, as for instance, by becoming owner of dangerous instruments, animate or inanimate. I shall hereafter argue that where the need of such organised co-operation is clear and urgent, the application of the individualistic principle may legitimately be extended to include its enforcement; but, at present, it seems best to confine our attention to governmental interference designed to prevent or remedy mischief manifestly caused by human action.

In considering this interference, we are met with a distinction commonly taken as fundamental between the two main functions into which the adminstration of law is divided, according to popular conception and received legal theory, viz. (1) the enforcement of damages due to the wronged individual; and (2) the infliction of punishment in the name of the community. According to my view, this distinction—though very important—is not so fundamental as it is commonly conceived to be: because I hold that both in determining when damages are due, and when punishments should be inflicted, for past mischief, the prevention of future mischief ought generally to be a paramount consideration. In order to justify this view, it will be well to begin by considering the meaning and extent of the distinction, as commonly conceived, and the different kinds of wrongs, or the different characteristics of wrongs, to which damages and punishment are respectively thought to be appropriate.

The popular view may be briefly expressed by saying that punishments are retributive[1] and damages merely

[1] I do not mean that the popular conception of punishment does not also

reparative. Punishments are thought to be the proper requital for acts that are not only harmful to others but immoral and blameworthy; whereas, in the case of such violations of rights as are not held morally blameworthy—because they are either unintentional or may fairly be supposed to have been committed by persons who believed they had justice on their side,—all that is thought to be generally necessary is that the injury shall be repaired or compensated: that the person injured shall be restored to the condition in which he stood before the injurious action, or placed in a condition equivalent in respect of advantages. This distinction between retribution and reparation is, I think, clearly found in the common moral consciousness of the most advanced modern societies.

It should, however, be noted that at an earlier stage of social and intellectual development this distinction is obscure, or but faintly perceptible; the penal loss of an "eye for an eye," or of a "tooth for a tooth," was commonly regarded as a kind of reparation to the person originally maimed.[1] And even at the present day in England, some writers, influenced by Bentham, speak of the "vindictive satisfaction" that punishment gives to the individual injured, as an important element of its utility. Thus Sir J. Fitzjames Stephen says that "the benefits which criminal law produces are twofold. In the first place, it prevents crime by terror; in the second place, it regulates, sanctions, and provides a legitimate satisfaction for the passion of revenge; the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[2] I think, however, that this statement goes further in legitimating the passion of revenge than the common moral sense of the present age and country can

include the prevention of crime by terror: but the notion of retribution is most prominent.

[1] It may be noticed—as an interesting point in the history of moral thought and feeling—that in Aristotle's conception of "corrective justice" (*Ethics*, Book v.), the notions of retribution and reparation appear to be completely blended.

[2] *General view of the Criminal Law*, chap. iv.

follow. I do not mean to deny that a desire for revenge, in the person injured, is generally necessary for the effective administration of criminal justice among human beings as actually constituted; I admit that if we could suppress the passion of revenge without effecting any other change in the moral nature of average men, we should do more harm than good. Nor, again, do I deny that the moral or quasi-moral demand for retribution on a wrongdoer, as felt not by the person primarily wronged but by other members of the community in which the wrong has been done, is a sentiment that may be traced back to the desire of personal revenge as one, at least, of the roots out of which it springs.[1] But I hold that the two impulses have now become completely distinct: though we now commonly think that morality requires that a crime should be punished, we yet think that the satisfaction which the person injured derives from this punishment has a certain taint of immorality. If it is asking too much of human nature to prescribe such a rigid exclusion of malevolent pleasure, at any rate we think that it ought not to be cherished, and dwelt upon, and made a conscious object of pursuit.

I consider, therefore, that Retribution on the wrongdoer, as demanded by the common sentiment of justice in civilised mankind, here and now, is altogether distinct from the Reparation which the same sense of justice also recognises as due to the person wronged. But when the two notions are separated, it must be plain that the popular view which regards such retribution as an end in itself, independently of its useful consequences in preventing future mischief, is strictly incompatible with the fundamental principle of Utilitarianism, assumed throughout the present discussion.

[1] J. S. Mill says (*Utilitarianism*, chap. v.): "The sentiment of justice appears to me to be the animal desire to repel or retaliate a hurt or damage to one's self, or to those with whom one sympathises, widened so as to include all persons, by the human capacity of enlarged sympathy and the human conception of intelligent self-interest. From the latter elements the feeling derives its morality." Provided that this is taken as an account of the *antecedents* rather than the *elements* of the sentiment in question, I am disposed to agree with it.

From a utilitarian point of view, the pain caused by punishment to the person punished is of course to be regarded as an evil, only admissible in order to prevent worse evil.

At the same time I do not doubt that the impulse to inflict harm, in the name of justice, on persons who have intentionally done mischief, is a practically useful element of the general moral disapprobation caused by such acts, and a most powerful auxiliary to the legal punishment by which government seeks to repress crimes. As Sir J. Stephen forcibly says: "Some men, probably, abstain from murder because they fear that if they committed murder they would be hung. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is, that murderers are hung with the hearty approbation of all reasonable men. Men are so constituted that the energy of their moral sentiments is greatly increased by the fact that they are embodied in a concrete form. . . . It is this secondary effect of criminal law which makes it important that law and morals should harmonise as far as possible, so that the one shall gratify the sentiments which the other excites." I agree in thinking this harmony between the moral and the legal repression of wrongs a most important advantage, that the legislator should always keep in view; but it is necessary to recognise that it cannot be completely attained. Mischievous acts, requiring severe repression on the part of government, are continually done, not merely from amiable motives but with excellent intentions. The sincerest religion, the most ardent patriotism, have prompted—and still occasionally prompt—men to homicide of the most dangerous kind; and, to take a minor offence more frequently committed towards private persons from good motives, there is no reason to doubt that many well-intentioned persons have held with Godwin,[1] that "if I have had particular opportunity to observe any man's vices . . . there may be very sufficient grounds for my representing him as a vicious man" in order to "warn those whom his errors might injure," even though "I may be wholly unable to demon-

[1] *Political Justice*, Book vi. chap. vi.

strate his vices;" and have thus from mere virtuous indignation and philanthropy incurred the legal punishment of libel. In such cases, though there may be a general sense that punishment is necessary, it is not demanded as a proper retribution on the ill-desert of the agent. Hence we cannot define the species of wrongs which ought to be repressed by punishment as wrongs inflicted with an immoral intention; since, though this characteristic is present in the great majority of acts that ought to be punished, it is clearly not present in all.

I conclude, then, that from a political point of view, it is evidently necessary to take as the primary end of punishment the prevention of mischief and not the retribution of wickedness: and to decide on this principle any doubtful questions as to the allotment of punishments.

§ 2. Let us now turn to consider cases where, in the common view, what is judicially enforced is compensation to the individual wronged, and not punishment on the wrongdoer. Here, too, we shall find that, though reparation is undoubtedly a part of the aim of law, the prevention of future mischief is also an important consideration:—and, generally speaking, the most decisive consideration in determining doubtful points.

Let us first observe that blameworthiness, in some degree, is normally characteristic of mischief for which reparation ought to be legally enforced as well as of that for which punishment is inflicted as punishment. This is not, perhaps, clear at first sight; it may be thought that the need of reparation arises from the mere fact that mischief, such as law aims at preventing, has been inflicted by A on B, without any consideration of the blameworthiness of A: that if A has caused, even quite accidentally, a loss of utility which must ultimately fall on somebody, it is more reasonable that the burden of the loss should be borne by A, who did, in a physical sense, act, than by B, who is innocent of any action whatever. But reflection will, I think, show that, from a utilitarian point of view, it would be wrong to hold men responsible for all results to which they

physically contributed, however impossible it may have been to foresee such results. It is fundamentally important for the general happiness of any society that its members should be acting strenuously and energetically in some way or other: and it would too seriously interfere with this to lay down the broad rule "that every man acts at his peril," and is responsible for any mischief that may result. I hold, therefore, that damages for unintentional mischief should only be legally enforced, as a general rule, when the man who has physically caused the mischief has not taken due and proper care: *i.e.* has not taken such care as would be taken by an ordinary person desirous of avoiding injury to others, as completely as this can be done without serious interference with his normal functions—supposing that his normal industry is not ordinarily dangerous. In this latter case special care may reasonably be required. The line, of course, is a difficult one to draw exactly: it must to a great extent be left to be decided by common sense and experience applied to particular circumstances. As will be seen from the language that I have just used, I by no means assume that in every case where a man was rightly held *legally* responsible for the consequences of his act, there was something *morally* blameworthy in the state of mind that preceded the act in question. As Mr. Holmes says: "The law considers what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that: if a man is born hasty and awkward . . . his neighbours require him at his proper peril to come up to their standard."[1] But it remains true that, if responsibility be thus determined, the object of the law in enforcing damages is in all cases not merely reparative, but partly also preventive: it aims at maintaining a certain average standard of carefulness by providing that those who fall short of this standard shall act at their peril.

In laying down as a general principle that reparation should only be due where there has been at least negligence, if not culpable intention, I do not mean to affirm that there

[1] Holmes on the *Common Law*, ch. ii.

may not be important exceptions. Where protection from a particular kind of mischief is of great importance, and where it is specially difficult to prove mischievous intention or neglect of others' rights on the part of persons who contribute in a secondary way to the mischief, it may easily be the less of two evils to make the burden fall on these contributories, though innocent even of negligence. This is perhaps the case where damage has been innocently done to the property of another by a man who had good reason for regarding it as his own. Suppose (*e.g.*) that a man has innocently purchased stolen goods, under circumstances which gave no occasion whatever for suspicion. It seems hard that he should have to compensate for any damage done to the goods: but considering the great importance of protecting property, the great difficulty of tracing it when stolen, the ease with which trade in stolen goods may be carried on undetected, it is perhaps needful, for adequate repression of this trade, and adequate determent to possible purchasers of other men's goods, to adopt the broad principle that no seller can give a better title than he has got: so that not only restoration of such goods, but also reparation for any damage done to them, will be due to the rightful owner from the most innocent and diligent purchaser. And other exceptions may have to be admitted on similar grounds. Still, I conceive it will remain generally true that the enforcement of damages no less than the infliction of punishment (in the narrower sense) should be regarded as implying, in the broad and general sense just explained, some degree of culpability in the person on whom reparation is imposed.

How then shall we distinguish the kind of wrongs for which the enforcement of damages is the appropriate penalty, from the kind of wrongs for which punishment proper is required? An answer often given to this question is that damages are the appropriate remedy for private wrongs, or encroachments on the rights of individuals considered as such; whereas punishment is required to repress public wrongs, or offences against the community. This

answer, no doubt, corresponds to the historical origin of the distinction,[1] but it is manifestly unsuitable to a fully developed system of jurisprudence so far as it maintains a distinction in kind between the mischief of crimes and the mischief of civil injuries: we cannot get beyond a distinction in degree. The graver mischiefs that we chiefly speak of as criminal are primarily inflicted on individuals, no less than the slighter injuries which only give a claim for damages: and what Bentham calls the "secondary evil" of alarm and danger, which unpunished crime tends to cause to the community at large, exists to some extent in the case of almost all violations of rights,—indeed it is less obvious and palpable in the case of many crimes than it is in the case of the unintended mischiefs which a modern system of law would treat merely as civil injuries. If A has wounded my neighbour to-day by firing a pistol carelessly in his garden, he is not unlikely to wound me before long in the same way if he is not made to suffer for his carelessness: but if he has wounded him in a duel, my alarm is at any rate more indirect and remote, since he cannot fight a duel with me without my consent.[2]

On the whole, then, it seems to me that the distinction between wrongs that give occasion for damages only, and wrongs that give occasion for punishment proper, is a subordinate one, which experience alone can enable us to draw in the best way, in establishing an actual system of legal sanctions. All governmental interference caused by proved

[1] In an interesting chapter (x.) of *Ancient Law*, Maine explains the lateness of the development of a true *criminal* jurisprudence in Rome—in the sense in which "criminal" implies the distinction of crimes from civil injuries—as due to "the very distinctness" with which the conception of a crime as a "wrong done to the state" was realised. He points out that the penal law which we find in early Roman jurisprudence "is not the law of crimes; it is the Law of Torts. The person injured proceeds against the wrongdoer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds." The same characteristic appears even more strongly in other primitive systems of law.

[2] No doubt each case of duel makes it harder for others to abstain: therefore an unpunished duel does tend to cause *some* alarm to members of the community generally.

violation of rights ought to aim, so far as possible, at repairing the past mischief as well as preventing future mischief of the same kind. In some cases the enforcement of adequate compensation—not only for the original wrong, but also for any trouble and expense entailed in the process of obtaining redress for it—is sufficiently onerous to the person who has violated another's right to render unnecessary any further purely penal intervention of government; and so far as this is the case, it is advantageous in all ways to avoid inflicting punishment as such for offences that cannot excite the clear and decided moral disapprobation which is commonly reserved for intentional misdeeds. In the case, however, of mortal injuries, where reparation is impossible to the person primarily injured, and prevention specially important owing to the gravity of the mischief, there seem to be overwhelming reasons for treating even mere negligence as criminal. And, on the other hand, there are minor injuries which, even though intentional, may be adequately repressed by the enforcement of damages; as (*e.g.*) malicious slander, in English law.

I think, therefore, that in a theoretical discussion of remedies for wrongs, Damages should be treated as one form of legal penalty, having, generally speaking, a preventive as well as a reparative function. It should be assumed (1) that the law will secure adequate reparation to the person wronged, so far as this is possible; and (2) that certain classes of wrongs—which experience alone can enable us to define—may be adequately repressed by the mere enforcement of damages: while in other cases, either from the gravity of the offence, or because, though socially dangerous, it causes no definite harm to assignable individuals,[1] punishment proper is the only suitable means of determent.

At the same time, I do not wish to underrate the practical importance of the distinction between punishments and damages, as appropriate respectively to crimes and civil

[1] It should be borne in mind that offences may be committed deserving severe punishment without any question of redress arising. Foiled attempts to commit grave crimes are examples of this class of offences:—*e.g.* forgery detected before it takes effect.

injuries. A clear distinction between the procedures belonging to the two kinds of remedies respectively is a necessary element of a civilised system of law. For where it is an adequate means of preventing wrongs to fix the burden of reparation on the wrongdoer, there is no absolute necessity for any intervention of government: the required reparation may as well be made privately between the parties, so that it may properly be left to the option of the individual wronged to invoke the aid of government if necessary. On the other hand, where punishment—as distinct from reparation—is needed in the interest of the community at large, it must be the business of government to secure that it shall be inflicted whenever it is deserved: to secure, therefore, that persons harmed by the crime shall come forward and give evidence, and shall not make peace with the criminal. And to attain this result, it is found more and more necessary, as civilisation advances, that government should make the prosecution of crimes its own business. Thus, though the ultimate end of both civil and criminal procedure is to a great extent the same—prevention of mischief—the regulations of the two systems are necessarily different; and historically they have shown a marked tendency to diverge more and more.

On this subject I shall have something more to say in the part of my treatise that deals with the structure of government. At present I shall confine myself to a brief discussion of the kinds and amounts of reparation that law-courts should enforce, and the kinds and degrees of punishment that they should inflict.

§ 3. First, as regards reparation. In the case of violations of the right of property, restitution in kind, where possible, and—along with or instead of this—an equivalent in money for the utilities of which the proprietor has been wholly or partially deprived, are the most obvious modes of compensation, and capable in most cases of being made adequate: nor does there seem to be any other available mode of making reparation for physical injuries to the person, though the adequacy of a money payment is in

this case much more doubtful. Where, however, it is the right to reputation that has been violated, the mischief done can be to a certain extent—though in many cases not completely—repaired by a public contradiction of the defamatory statement that caused it; and where such a contradiction is voluntarily made by the defamer the Courts should recognise it as at least a part of the compensation that it is their business to enforce. But such a contradiction could not be made compulsory, and its refusal criminal, without danger of forcing the defamer to say what he did not believe to be true: nor is there any necessity for such compulsion, since, if the defamer refuses to retract his defamatory statement, the end in view can be sufficiently attained by the publication of the Judge's decision that the statement was false.

The most difficult case is that of injuries to reputation, which result not from false statements, but from insults which, according to the common sentiment of civilised Europe—or of the gentry in European countries—it is discreditable to endure tamely. So long as this sentiment —a survival from more disorderly times—continues strong, it is probably impossible to find any mode of completely repairing the injury done to reputation by such insults; but probably the closest attainable approximation to reparation is to be got by inflicting a humiliating punishment, having some similarity to the insult. This suggestion is worked out in detail by Bentham; and though several of the humiliations that he proposes are too grotesque to be adopted, the need that they are designed to meet is still a real one; and in many cases it would, I think, be possible to find expedients for meeting it, which should not be grotesque or otherwise undignified.[1]

For the injury done to a woman's husband, father, or

[1] See Bentham's *Principles of Penal Law*, ch. xv. (Works, vol. i. p. 381). Among other too grotesque suggestions, I may notice that of "emblematical robes," or "masks," with "a magpie's or a parrot's head in cases of temerity"! On the other hand, I see no reason why a verbal insult should not entail "speech of humiliation prescribed to the offender," or even, if this did not suffice, a humiliating posture.

other relatives by her seduction, I know of no appropriate reparation; and, so far as it is desirable that this mischief should be legally repressed, I think it is a case for punishment rather than damages.

Where the injury for which reparation is due has not been provoked or in any degree caused by culpable acts or omissions on the part of the person injured, the proper amount of pecuniary compensation is, in the abstract, not difficult to determine: it should be an equivalent not merely for the original injury, but for the sacrifices entailed by the process of obtaining reparation. When, on the other hand, the person injured is partly to blame, it is obviously reasonable that the compensation should be diminished by an amount proportioned to his share in causing the injury: though it may often be impossible to determine the diminution otherwise than very roughly.

I may observe that the question of reparation is important not only to the individual wronged, but also to others: since, if reparation can be made adequate, the expectation of obtaining it very much reduces the alarm caused by the offence. Hence the special importance of preventing by effective punishment *irreparable* wrongs.

§ 4. Let us now pass from the consideration of Damages to that of Punishment in the narrower sense. In selecting the kind of punishment, the first point to notice is, that though punishment mainly prevents wrong by *deterring*—and this is its sole preventive operation so far as it acts on others than the person punished—still, so far as the criminal is concerned, there are two other modes of prevention of which we must not lose sight: viz. *Reformation* and *Disablement*. It is therefore desirable, so far as possible, that the *kind* of punishment should be selected with a view to these important though subordinate ends.

Reformation is especially to be aimed at in the case of juvenile offenders, disablement in the case of offences committed by influential persons in transient crises of civil strife. For both these ends imprisonment is the obvious means; for the former, imprisonment with labour, care being

taken not to render the labour needlessly repulsive, and to allow industry to obtain its natural reward.

It is a difficult matter to determine satisfactorily the right degree of punishment for any given offence. It is easy to say, with Bentham, that it ought to be sufficient to deter, and not more than sufficient. But our general knowledge of the variations in human circumstances and impulses would lead us to conclude — what specific experience amply confirms — that no punishment whatever can be relied on to be adequately deterrent in all cases. Murder and manslaughter, burglary and larceny, have continued to harass society through all changes in the allotment of punishment; and no change is likely to put an end to them. Now, impulsive crimes we cannot hope to prevent by any intensification of punishment until human nature is fundamentally altered: but crimes planned in cold blood are matters of calculation, and it does not seem impossible that it should be made unmistakably a man's interest, on a cool calculation of chances, not to commit a crime. Since, however, the attainment of this result depends not only on the amount of punishment, but also on the chances that the criminal (1) will be caught, and (2) will be condemned if caught, it may easily happen that in a community where the police is ill organised, and the judges corrupt or inefficient, the required adjustment of interests cannot be effected: the uncertain chance of the maximum punishment which humanity admits may not be enough to outweigh the prospective profit of the crime. For the same reason, in societies where similar governmental defects exist in a less degree, an increase in the efficiency of police and judicature will often enable intensity of punishment to be reduced without increasing crime.

The difficulty of adjusting amount of punishment to gravity of offence, in a manner adapted to meet all variations in human nature and its circumstances, affords a strong argument for increasing heavily the severity of punishment at each repetition of any kind of deliberate crime:[1] since the

[1] The force of this consideration may be neutralised in particular cases by special extenuating circumstances.

fact that a man, after suffering the punishment of an offence committed in cold blood, proceeds to commit another offence of the same kind, is tolerably conclusive evidence that in his particular case the punishment already inflicted was not sufficiently deterrent.

There are several other considerations that ought to be taken into account, in the selection and graduation of punishments: of these the following appear to be the most important:

1. To realise the principle of justice that similar cases should be treated similarly, it is important that punishment should be *equable; i.e.*, that a punishment of a certain denomination—say imprisonment—should not mean different things in different cases. This is an argument (*e.g.*) for central rather than local management of prisons: for watchfulness as to effects on health, etc.

It is to be observed, however, that this principle is almost impossible to realise in dealing with offenders drawn from different classes in the community. We cannot, even by proportioning the sum imposed to the offender's income, so far as we can ascertain it, prevent punishment by fine from being practically less severe to the rich than to the poor; and it is still more clear that we cannot prevent imprisonment with labour from being more severe to the former. And perhaps, on the whole, it is not undesirable that the rich should suffer somewhat more, as crime may be presumed to be generally more culpable in persons of better education, and shielded by their wealth from the severe temptations incident to poverty.

2. Avoidance of excess in punishment is important, not only in order to inflict no more pain than is needed—which, of course, is to be aimed at from a utilitarian point of view—but even more in order that different degrees of punishment may all be adequately deterrent, where the criminal has choice of alternatives of crime, differing in degree of mischievousness. It is of fundamental importance that a man should always have adequate motive to refrain from committing each successive part of any possible complex offence, or a greater offence, instead of a lesser. Punish-

ment, therefore, should be so chosen that clearly greater punishments may be allotted to more mischievous crimes.

This is one argument for attaching capital punishment to murder alone: so that (*e.g.*) the thief or burglar may have an adequate inducement not to commit murder even when it would give him an additional chance of getting off.

3. From a utilitarian point of view, it is plain that, supposing the preventive effect of punishment undiminished, the less pain it actually gives to a criminal the better. Hence, it is an advantage that punishment should be, so far as possible, what Bentham calls "exemplary," *i.e.* greater in appearance than in reality, since it is chiefly appearance that deters. And, of course, punishments of the opposite kind, really worse than they seem, should be carefully avoided.

But in seeking to make punishments "exemplary," care should be taken to prevent them from being offensive to popular feeling, and so likely to arouse aversion to the administration of the law, and dangerous sympathy with the criminal punished. Moreover, the infliction of pain beyond a certain degree of severity would be opposed to a sentiment of humanity, which it is not merely politically dangerous to offend, but important to the wellbeing of society to maintain and develop.

4. Punishment should be as little as possible burdensome to the community: *e.g.* if useful labour is adequately deterrent its utility is so much gain: and, similarly, if the penalty suffered by the wrongdoer is at the same time *compensatory* to persons wronged. Indeed, as we have seen, so far as compensation can be adequate, the enforcement of it may be sufficiently preventive of the offence.

5. Finally, taking mistakes into account, it is well that punishment should be *remissible* if possible. This is, of course, an objection to capital punishment—though not, in my opinion, a decisive one; also to the infliction of lesser bodily injuries, such as maiming.

## CHAPTER IX

### PREVENTION OF MISCHIEF AND PATERNAL INTERFERENCE

§ 1. In the last chapter I was concerned with the distinction between Punishments and Damages, and the distinction—which is usually conceived to correspond to this—between public offences and private or civil injuries. According to me, neither distinction in a well-organised system of remedies for wrongs would—though important—have quite the fundamental importance which it has in English law. For, from a utilitarian point of view, all punishment is preventive in its ultimate end, and not retributive; though it is desirable that, *so far as possible,* intentional acts that call for punishment should be regarded with moral disapprobation and aversion. And again, the infliction of damages must be mainly determined by considerations of *prevention* and not of *reparation* alone; since, generally speaking, damages should not be enforced for mischief done by A to B, unless the mischief could have been avoided by care which an average man can be made to take without material alarm or distraction from his ordinary avocations.

It seems to me better to say (1) that reparation as well as prevention should be the general aim of governmental interference in the judicial way; and (2) that in some cases the mere enforcement of reparation may be adequate for purposes of prevention.

I pointed out, further, that prevention was not *only* though *mainly* attained by the deterrent effect of punishment. This is its sole preventive effect on *others:* but as

regards the individual punished, prevention may also be attained by reformation and by disablement.

I then went on to consider briefly some of the leading characteristics of well-chosen punishments.

Punishments should be so chosen that a given denunciation of punishment shall, as far as possible, not mean very different actual degrees of severity in different cases. It should, if possible, be severe enough for the chance of it to outweigh clearly, on a cool calculation, the advantage of the crime: capable of gradation, so that a criminal may always have adequate inducement to prefer the lesser offence to the greater: not severer in reality than in appearance, since it is appearance that deters: as little burdensome as possible to all but the criminal, and so far as may be remissible.

In order to complete the theory of remedies for wrongs, we have now to consider other modes of preventing—and to a less extent of repairing—mischief caused to men by their fellows. We must (1) first take note of one indirect method of preventing wrongs which is only an extension of the method discussed in the previous chapter: I mean that of deterring, by infliction of punishments or enforcement of damages, not only the actual violators of any rights but those who incite others to violate them. The general expediency of this is manifest; though it is sometimes a matter of much delicacy to determine, in particular cases, what expression of opinion or sentiment may reasonably be held to constitute an incitement to law-breaking. Nor is it less manifestly expedient (2) that government should intervene with physical force to protect private rights, in cases where the deterrent effect of punishment has manifestly proved inadequate for their protection—*i.e.* where a manifest wrong is actually being committed, or where the intention of committing it is plainly shown. It is not necessary that the wrong should be intentional: wherever manifestly illegal annoyance is being caused to any person by the action or inaction of others, it is desirable that Government should intervene to remove it, so far as the machinery required for such intervention would not entail

expense more burdensome to the community than the annoyance that would be prevented.

This proviso, however, leads us to observe (3) that the primitive method of self-defence and self-reparation must be allowed some place in the most completely civilised community. Improvements in legislation and the administration of law tend to reduce this within ever-narrowing limits: but as the eye and hand of government cannot be everywhere, any private individual must be allowed to defend with force himself, and any neighbour who is forcibly attacked in person or property; under the condition that the mischief inflicted on the aggressor is not clearly out of proportion to the aggression—*e.g.* I must not shoot a man for trespassing on my land. Similarly private persons must be allowed to abate any nuisance that needs an immediate remedy—*e.g.* cut down a fence across a public road. But though, when a wrong is threatened or begun, the immediate use of force is often necessary to prevent or terminate it, there is not the same need for promptitude in punishment: hence any violence that is not needed for the repulsion of wrong, and therefore merely serves to gratify the resentment of the person assailed, must be prohibited as illegal, owing to the great public importance of preventing private fighting. But forcible reparation—as distinct from retaliation—should be allowed to a limited extent on the same grounds as self-defence: thus, the forcible recapture of property, that has been taken away without pretence of legal right, should be allowed where delay in recapture is likely to entail further injury.

Further (4), we have seen that one end of punishment is to disable the criminal from further crime—for example, by imprisonment. A similar restraint of personal liberty is obviously expedient in the case of persons who are merely suspected of crime, if the grounds of suspicion be adequate:[1] since otherwise a criminal aware that he was suspected might always evade punishment by absconding

[1] I shall notice in a later chapter the need of limiting this power by constitutional securities.

before the legal proof of his crime was complete. So, again, the mischief that might be done, to others as well as to themselves, by persons bereft of reason, ought to be prevented by placing them under special watch and restraint, so soon as their irrationality is evident.

Again (5), in the case of mischief against which the persons liable to injury can, and probably will, protect themselves if duly warned, it will hardly be doubted that government may legitimately intervene in the way of warning or diffusing information,—as when the police inform the public that there is a special danger of pickpockets. Such information may be indirectly as well as directly given: thus, by instituting a certificate obtainable by professional men—physicians or teachers—whom it deems properly qualified, Government indirectly warns the public against impostors who may attempt to practise these callings without the requisite qualifications.

No one, again, will doubt (6) that where mere warning is not likely to be sufficient, Government may properly intervene to prevent certain kinds of mischievous acts or neglects by inspecting the processes in connection with which they are liable to be committed, so far as these processes are carried on in public;—as (*e.g.*) by inspecting shops and markets to prevent the deception of purchasers by sellers.

§ 2. But further: I conceive that the last-mentioned kind of intervention may reasonably be accompanied with regulations ordering *precautions* against harm,—*i.e.* Government may prohibit acts or omissions not directly or necessarily mischievous to others, but attended with a certain risk of mischief. And similar regulations may be applied to processes carried on otherwise than in public: so that, in order to secure their observance, Government must have the power of entering, for purposes of inspection, private grounds and buildings. Here, however, we have come to an extension of governmental interference, the legitimacy of which—though its aim does not go beyond the protection of individuals from mischief caused by other individuals—has been in some cases seriously disputed by individualists. Still in other cases

it has been undertaken without any practical opposition: and, in fact, a considerable amount of interference of this kind is, however, now judged necessary by our own and other civilised Governments. I may give as instances restrictions on the manufacture and carriage of explosive substances and rules against importing cattle from countries where the disease is rife.[1] It is not certain that any given cargo of suspected cattle or carelessly carried explosives would do any harm: but most prudent persons see that the risk is too great to run. And I do not think it can be doubted, on utilitarian principles, that this kind of interference may be necessary to an extent that cannot be exactly defined: it is merely a question of the degree of risk.

Sometimes the burden thus imposed on private persons is so slight in comparison with the evils guarded against, that no one would hesitate to impose it, if experience shows it to be at all efficacious for the attainment of the end in view. This is the case when Government, besides diffusing information and warning, imposes on others the duty of furnishing it; to remove or reduce the risk of mischief through violence, negligence, or fraud,—as when it orders that poisons when sold should be designated as such, and that the name and address of persons to whom they are sold should be preserved; or to facilitate the attainment of redress in case of wrong—as when it requires printers' and publishers' names to be affixed to publications. Instances of the same kind are the prescription of standard weights and measures, as a precaution against fraud, and the compulsory registration of mortgages and bills of sale.

Where the restraints or burdens imposed by such interference are more serious, the annoyance and cost entailed by it, on the community or on individuals, must of course be carefully weighed against the evils which experience shows it to be capable of preventing: and under the head of cost must be included any economic loss caused by the enforced substitution of a more expensive for a cheaper process of attaining any industrial end. But I do not think

[1] I give these as clearly not what I go on to call "paternal."

that any general rules can be laid down for determining the limits of such interference: all we can say is that a milder degree of interference, if effective, is generally to be preferred.

The possible gradations in intensity of interference will of course vary according to circumstances; but I may give one or two illustrations of them.[1] I may begin by referring to the much-discussed case of restrictions on freedom of speech or writing, so far as such restrictions are designed to protect the rights of private persons.[2] There are obvious and great advantages to be gained by leaving men as much liberty as possible to argue that certain established rights, or certain modes of exercising these rights, are injurious to the community and ought to be suppressed: since it is through judicious criticism of this kind that improvements in legislation and administration in law are chiefly to be expected, while in other cases—where a change in legal rights is inexpedient—such criticism may be useful in rousing public sentiment to supplement the inevitable deficiencies of law: and if judicious criticism is to be allowed and even encouraged, injudicious criticism must be tolerated to some extent, even though it has a certain tendency to cause violations of law. Hence, even when this dangerous tendency is so marked as to render some repression of free criticism less mischievous than complete toleration, it is generally expedient to confine this repression to the more inflammatory modes of publishing opinions hostile to established rights: for instance, to allow such opinions to be published in books, when they could not be tolerated in speeches or placards.[3] Other dangerous practices—such as excessive drinking of alcohol—may be tolerated in private but repressed in public. Or, again,

[1] Other kinds of gradation will be noticed later. See p. 132.

[2] Restrictions on freedom of discussion, imposed in the special interest of government, will be considered in a later chapter.

[3] "An opinion that corn-dealers are starvers of the poor, or that private property is robbery . . . may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard."—J. S. Mill, *On Liberty*, ch. iii.

restrictions may be imposed not on the persons who do the acts liable to be followed by mischievous consequences, but on the traders who, for private gain, supply facilities for such acts,—as when the publican is forbidden to sell alcohol to a person who is clearly intoxicated, or is known by him to be a habitual drunkard. This last kind of interference is, indeed, no less intense than that for which it is a substitute; but, owing to its limited range, it is practically less vexatious.

§ 3. Here, however, it has to be observed that in dealing with these and similar concrete examples of what may be characterised as "indirectly individualistic interference," we see that it is very difficult to distinguish it in practice from the kind that I have called "paternal." Abstractly considered, the question (1) "How far Government may legitimately go in preventing acts or omissions that are not directly or necessarily harmful, on the ground that there is risk of their causing mischief indirectly to persons, other than the agent, who have not consented to run the risk," is quite distinct from the question "How far Government ought to interfere to prevent mischief caused to an individual by himself or with his own consent." But in concrete cases the two questions are almost always mixed up, since, where a man's acts or neglects tend to harm himself so seriously as to suggest a need of governmental interference to prevent the mischief, they tend also to harm others. An illustration of this may be found in the sanitary regulations enforced by our own legislation. When a man is forced to co-operate with his fellow-citizens in a common system of drainage and water-supply, when he is prevented from using a house unfit for human habitation, or from overcrowding any part of a house, it may be said that coercion is applied to him in his own interest: and no doubt it is designed that he should derive benefit from the coercion; still its main justification lies in the need of protecting children and other adults who might suffer if his house became a focus of disease. Similarly, few individualists are so extreme as to deny that the tendency of drunkenness to cause breaches of the peace is a legitimate ground for

*some* interference with the trade of selling alcohol: and the most thoroughgoing abolitionist urges restriction more as indirectly individualistic than as paternal—*i.e.* more on the ground of the proved tendency of alcoholic excess to make a man beat his wife and starve his children, than on the ground of its tendency to injure the drunkard himself.

So again, where an individual would evidently cause danger to the physical wellbeing or the property of others by not taking precautions to protect his own person or property from certain external sources of mischief,—as in the case of protection of land from floods, or of men or useful animals from infectious diseases,—it is not, I conceive, an undue extension of the individualistic principle to make him responsible, after warning, for the injury that his neglect may cause to others: and if so, when this injury is likely to be, in kind or amount, such as he could not adequately compensate, it is a reasonable extension of the principle to compel him to co-operate with others in a general system of precautions. And though the benefit of such compulsion may be primarily received by himself, since the decisive ground for adopting it is the prevention of mischief to others, it is not properly to be regarded as "paternal" interference,—in the special sense in which I have adopted this term. Similar reasoning is applicable to the provision of means for *reducing* mischief caused by accident or neglect, when such mischief is liable to spread: as in the case of fires in towns.[1]

Other interferences that seem *primâ facie* "paternal" in their aims are partially defensible, from an individualistic point of view, on a different ground. For instance, when our Government endeavours to prevent its subjects from employing improperly qualified physicians, apothecaries, and pilots; or from buying meat known to be diseased; or from taking part in dangerous industrial processes—as (*e.g.*)

[1] Even so decided an advocate of *Laisser Faire* as M. Paul Leroy-Beaulieu considers that the "pompiers volontaires qui l'on voit encore a Londres" perform a function that had better be organised by government. *Revue des deux Mondes*, 1888, iv. p. 931.

mining and navigation—without due precautions, it may be said that it aims merely at protecting its subjects from evils incurred through ignorance of which other persons take advantage; and that this is a legitimate extension of the protection against deception, which individualists have always regarded as being within the limits of their fundamental rule. And a similar view may also be taken of another important class of cases in which the mischief sought to be prevented is pecuniary loss. Thus, it may be said that the prohibition of "truck" (that is, of the payment of wages otherwise than in money) is "indirectly individualistic" and not "paternal;" since its design is merely to secure to labourers the amount of real wages that is by contract fairly due to them, by preventing the diminution of such real wages through the supply of goods of inferior quality, at a price above their market value.

The truth is—as the discussion of the conditions of valid contracts showed us—that it is a task of much delicacy to define the individualistic principle, in relation to deception, with the exactness required for practical application. When it is affirmed that an "individual should be left to take care of his own interests," some proviso is always understood with regard to his protection against imposture: but the precise nature of the proviso is left somewhat obscure; and it may be plausibly extended to prohibit any man from knowingly profiting by the ignorance of another. And if we go as far as this, it may be plausibly urged that it is desirable, when possible, to go further, and prevent A from profiting by the manifest ignorance of B, even when it is shared by A; especially considering the great difficulty of ascertaining whether or not an impostor is self-deceived. But when we have come to this point, the line between individualistic and paternal interference will have practically vanished. And even the rule that no one may *knowingly* profit by the ignorance of another, if consistently applied to commercial dealings, would carry us far beyond what any individualist has ventured practically to recommend; and—if it could ever be effectually carried out—would seriously impair the

stimulus to the acquisition of useful knowledge on which individualism relies. I think, therefore, that we must interpret the proviso above mentioned as merely prohibiting a man from profiting by ignorance that he has contributed to produce: and it is on this view that I should define the limits, in the cases above mentioned, of directly individualistic interference. To prevent the flesh of diseased animals from being disguised as the flesh of healthy animals; to prevent would-be surgeons or apothecaries from pretending to have obtained certificates of qualification which they have not really obtained; to oblige employers who may have contracted to pay wages in goods to supply such goods in strict accordance with contract as regards quality and price;—all this is clearly and directly individualistic: but if Government goes beyond this, so far as to prohibit the purchase of food it deems unhealthy, the consultation of physicians it deems unqualified, the adoption of methods of payment it deems unfit, its action must be admitted to be paternal.

In many of these cases, however, it is possible for Government to do more than prevent deception, without incurring the chief objections to "paternal" intervention: it may take measures to remove the ignorance of consumers as to the dangerous qualities of commodities offered for purchase, or the ignorance of labourers as to the dangerous nature of instruments which their employers require them to use, without compelling any one to act on the information thus supplied. Such a procedure is, in my view, within the limits of the "indirectly individualistic" intervention of Government discussed in this chapter; since its aim is to protect individuals from mischief caused by the action of others, the risk of which—as they are supposed not to know it—they can hardly be said to have consented to run. We may assume that the great majority of persons do not wish to shoot with gun-barrels that are liable to burst, or to consume condiments rendered attractive by poisonous colouring matter:[1] and if the dangerous quality of these and other commodities can only be known by technical skill, the

[1] See Jevons. *The State in Relation to Labour*, chap. ii.

coercion involved in raising by taxation the required funds, to provide for the examination by experts of such commodities before they are sold, is but a slight price to pay for the consequent protection against mischief. The consumer might still be left free to buy unsafe guns or poisonous pickles if he chose. Similarly, unseaworthy ships and unnecessarily dangerous machinery might be examined and reported on by governmental experts, without any positive prohibition of their use, in case persons were found to run the risk of using them in spite of full and clear warning.

§ 4. In what I have said above I do not at all mean to imply that all governmental interference which is palpably and undeniably "paternal" ought therefore to be rejected without further inquiry. I consider that so uncompromising an adhesion to the principle "that men are the best guardians of their own welfare" is not rationally justified by the evidence on which the principle rests. I regard this principle as a rough induction from our ordinary experience of human life; as supported on an empirical basis sufficiently strong and wide to throw the *onus probandi* heavily on those who advocate any deviation from it, but in no way proved to be an even approximately universal truth. Hence, when strong empirical grounds are brought forward for admitting a particular practical exception to this principle—when, *e.g.*, it is proved that men are largely liable to ruin themselves by gambling or opium-eating, or knowingly to incur easily avoided dangers in industrial processes—it would, I think, be unreasonable to allow these practices to go on without interference, merely on account of the established general presumption in favour of *laisser faire*. The particular cases in which such "paternal" intervention is on the whole desirable must be determined by experience, and will naturally vary with times and circumstances: all that can be laid down generally is, that this kind of governmental action shall be reduced within the narrowest limits compatible with the attainment of the end in view. Accordingly, it is generally better that paternal interference should take any other form than that of directly command-

ing a man, under penalties, to do what he does not like for his own good, or not to do what he likes. Of the possible milder modes of interference I have already given some examples. For further illustration, let us consider the different ways in which Government may intervene to secure adequate qualifications in any class of professional men, *e.g.* physicians. Quackery is very mischievous; but it would be too violent an encroachment on freedom to prohibit men from consulting a quack and taking his advice; or even to prevent this indirectly, by punishing the quack; since Government would thus present itself to the quack's dupes in the odious position of standing between a sick man and the recovery of his health. But without any action of this irritating and strongly coercive kind, Government may do much to reduce the mischief of quackery in the following ways:—

(1) It may, as was before said, institute an authoritative certificate as a guarantee that the holder has gone through a certain course of training, and may require an uncertificated practitioner to abstain from concealing in any way the absence of the certificate; (2) it may give damages, or even, in grave cases, enforce punishment, for grossly unskilful treatment by an uncertificated practitioner, when the results of such treatment have been clearly mischievous; and finally (3) it may refuse to uncertificated practitioners the legal right of receiving fees from their patients.

This last is an example of a kind of interference which it is important to distinguish and contemplate in a more general way; since it is free from some weighty objections commonly urged by advocates of *laisser faire* against the extension of governmental interference. Such objections are not solely based on the supposition that the individual is the best guardian of his own interests; it is also urged that the efficiency of Government is likely to be impaired by any considerable increase of its functions—that "the machine will break down through overwork,"—or that the consequent increase of its power and patronage constitutes a political danger. And, again, the importance of minimising the direct annoyance caused by governmental coercion is urged, not only because

such annoyance is *pro tanto* a diminution of happiness, but even more, because the resulting discontent is politically dangerous. Now, all these objections are avoided when the influence of Government on private action—as in the case of the quack's fees—is exercised not by positive, but by negative interference, *i.e.* by declining to interfere. Several examples of this may be found; *e.g.* the right of self-defence and the recapture of property, and the important family rights of the husband and father, are mainly established by the withdrawal of the ordinary protection of the law from the persons against whose will these rights are or may be exercised. So again, we noticed in dealing with the conditions of valid contracts that there is a margin of conduct mischievous in its effects which it would do more harm than good to prevent by the more intense method of prohibition and punishment, but which it is nevertheless expedient to prevent by declining to enforce contracts which facilitate it: the most important instances of this are contracts of which the subject-matter involves sexual immorality. The invalidation of oppressive usurious contracts is a historic case of paternal interference falling under the same general head.

Another important way in which Government may practically determine the relations of private citizens without coercion is by giving an authoritative interpretation to ordinary contracts, in points left ambiguous by the words or other signs actually used by the contracting parties. Thus, in an ordinary contract of sale in England, a purchaser's promise to pay twenty pounds is defined by Government to mean a promise to pay at least eighteen gold sovereigns, of full weight, together with either two sovereigns, or forty shillings;[1] or else to pay Bank of England notes for which coin to the amounts above mentioned may be obtained on demand. Bi-metallists urge that it would be desirable to change the definition and interpret the promise as an undertaking to pay either twenty gold sovereigns or silver coin in a certain fixed proportion, or notes of the Bank of England similarly

[1] I omit, for simplicity, the alternative of paying twelvepence instead of a shilling.

redeemable in either metal. If this measure were adopted, no one would be compelled to sell or buy goods on these terms: any seller who chose might still insist on receiving gold; still it is most probable that the effect of fixing this bi-metallic interpretation on all contracts, in which sums of money were mentioned without an express limitation to gold, would be to bring both metals into approximately equal use as currency.

In some cases this mode of interference is adapted to the realisation of the "paternal" principle: but it is probably more often used when the end in view is not the promotion of the interest of the individual interfered with, but of the community of which he is a member.

§ 5. So far, in speaking of governmental coercion, exercised in the interest of the person coerced, as "paternal," I have had solely in view the coercion of adults. Of course no individualist objects to coercion exercised on children in their own interest: nor can it be maintained that the interests of children can safely be left altogether to their parents: still less, that they can be altogether left to any guardian that its parents may designate. Hence some right (and duty) of governmental interference, to protect children from mischief caused actively or through neglect by their parents and guardians, must be admitted in the strictest individualistic scheme. Thus the limitations on the employment of children in factories and workshops, which have now been adopted by most civilised countries, are approved even by decided advocates of *laisser faire:* and interference with the labour of women during the period of childbearing is theoretically defensible on similar grounds, as an indirect protection of the physical wellbeing of children; though it is beset with great practical difficulties.

On the other hand, children obviously cannot be protected like adults against personal confinement or assault, as these may be necessary means of education. And, on the individualistic principle, since the burden of rearing and training children should be, as far as possible, thrown on their parents, it seems desirable, so far as this burden

is fairly taken up, that the parent's discretion in the training of the child should be left as unfettered as possible, and that Government should only intervene in a purely coercive way when the child's interests are manifestly being sacrificed, either through the greed or passion of the parents, or through gross neglect or ignorance. How far, when the parents cannot afford to support or educate their children, they should, under any conditions, receive pecuniary aid from Government to enable them to discharge these duties is, for individualists, a difficult and doubtful question. On the one hand, when it is evident that children are, through their parents' poverty, growing up in such a way as to render them likely to be burdensome or dangerous to society, it seems *primâ facie* a prudent insurance against this result for the community to assist in their support and education. On the other hand, similar arguments may be used to justify a governmental provision of sustenance for adults, in order that they may not be driven into criminal courses: and if either kind of governmental assistance is once admitted as justifiable in principle, it seems difficult to limit the burden that may be thrown on industrious and provident individuals by the improvidence of others. At any rate it is clear that either question brings us to the debatable territory between Individualism and Socialism; which I propose to examine in the following chapters.

To the same ambiguous region belongs the discussion of another kind of governmental interference, which may be justified as indirectly individualistic: I mean the provision of machinery for bringing moral influence to bear upon members of the community. The efficacy of this in diminishing the danger of crime has been urged to justify the employment of public funds in endowing Christian churches in modern states, and it cannot be denied that there is some force in the argument: but the consideration of the proper relations of Church and State cannot be adequately conducted from this point of view alone.[1]

In conclusion, it may be well to point out that the

[1] See chap. xiii. § 5, and chap. xxviii.

extent to which the kind of interference discussed in the present chapter should be carried in a modern state will partly depend upon a variety of considerations, the force of which cannot here be estimated. Thus, we have to consider the state of moral opinion in the country—since the repression of mischievous conduct by social disapprobation may render legislative repression unnecessary; the diffusion of knowledge in the community; the customs, industrial and social, actually prevalent; and the development of the habit of voluntary combination among the citizens. For example, where a mischievous or dangerous custom prevails, which it is difficult for an individual to avoid conforming to, there is *primâ facie* special need for legislative interference: on the other hand, in proportion as the habit of combination is developed, this need is diminished.

# CHAPTER X

## SOCIALISTIC INTERFERENCE

§ 1. In the last chapter we were occupied in considering the general distinction between "individualistic" and "paternal" interference, and the exceptions to the general rule of *laisser faire*[1] that should be introduced in consequence of empirical proof—in any particular case—that men cannot be trusted to take care of their own welfare. In the present chapter I propose to consider the limitations and exceptions to *laisser faire*, of which the primary aim is not the welfare of the particular individual restrained, but of the whole society of which he is a member; which, accordingly, it seems convenient to call, in a wide sense, "socialistic" and not "paternal."

It is to be noted that the principle which limits governmental interference to the prevention of mutual interference among the governed, if stated without qualification and maintained on utilitarian grounds, requires for its justification two distinct fundamental assumptions,—one of which belongs rather to psychology, while the other is purely sociological. It is to the first of these that chief attention has been paid; and it is this which is mainly important when the discussion relates to *paternal* interference. When the question is whether Government should or should not coerce an individual in his own interest, it is enough to show that, on the

[1] I use this current phrase to mean the rule of "letting people manage their affairs in their own way, so long as they do not cause mischief to others without the consent of those others."

whole, in the matter in question, men may be expected to discover and aim at their own interests better than Government will do this for them: that from their better opportunities of learning what conduces to their own welfare, or from their keener and more sustained concern for the attainment of this, the ultimate—if not the immediate—result will be better than any that could be attained by placing them in governmental leading-strings; while, further, this habit of self-help will give not only knowledge, but also self-reliance, activity, enterprise.

But, granting all this to be generally true, it by no means follows that an aggregate of persons, seeking each his own interest in the most intelligent and active manner possible, is therefore certain to realise the greatest attainable happiness for the aggregate. Indeed, it is obvious that if the mode of action on the part of any one individual which is most conducive to his own interest diverges from that which is most conducive to the interest of all, then the more completely he is left free to pursue the former end, the more certain it is that he will not promote the latter in the highest attainable degree. Hence, to complete the theoretical argument for *laisser faire*, we require, besides the psychological proposition that every one can best take care of his own interest, to establish the sociological proposition that the common welfare is best attained by each pursuing exclusively his own welfare and that of his family in a thoroughly alert and intelligent manner.

Now this latter proposition has been maintained, in a broad and general way, by the main tradition of what is called "orthodox political economy," since its emergence in France in the middle of the last century. The argument may be briefly stated thus: Consumers generally—*i.e.* the members of the community generally, in their character as consumers—seeking each his own interest intelligently, will cause an effectual demand for different kinds of products and services, in proportion to their utility to society; while producers generally, seeking each his own interest intelligently, will be led to supply this demand in the most

economic way, each one training himself or being trained by his parents for the most useful—and therefore best rewarded—services for which he is adapted. Any excess of any class of products or services will be rapidly corrected by a fall in the price offered for them; and similarly any deficiency will be rapidly made up by the stimulus of a rise. And the more keenly and persistently each individual—whether as consumer or producer—pursues his private interest, the more certain will be the natural punishment of inertia or misdirected effort anywhere, and the more complete consequently will be the adaptation of social efforts to the satisfaction of social needs.

According to my view, both the psychological generalisation that individuals are likely to provide for their own welfare better than Government can provide for them, and the sociological generalisation that the common welfare is likely to be best promoted by individuals promoting their private interest intelligently, are to a great extent true. The motive of self-interest does work powerfully and continually in the manner above indicated; and the difficulty of finding any substitute for it, either as an impulsive or as a regulating force, appears to me a valid ground for rejecting all large schemes for reconstructing social order on some other than its present individualistic basis. I do not doubt that what I have before distinguished as the "individualistic minimum" of governmental interference ought to constitute the main part of such interference, until the nature of an average civilised human being becomes very different from what it is at present; and the socialistic interference for which, in the present chapter, I propose to offer a theoretical justification, is conceived by me merely as a supplementary and subordinate element in a system mainly individualistic. At the same time I think it important to maintain that there is no reason—either from our general experience of human conduct or our specific experience of modern legislation—to regard either of the fundamental assumptions above distinguished as universally true; or even as so nearly true that we may confidently disregard empirical arguments for deviat-

ing from *laisser faire* in special cases. And as regards the sociological argument in particular, it can be shown by general reasoning that there are important cases in which it manifestly fails to establish the practical conclusion based on it.

In examining these cases from the point of view of general theory, it is convenient to begin by granting the assumption—tacitly made in the general economic argument that I have just given—that the higher market value of products and services consumed by the rich, as compared with those consumed by the poor, represents a correspondingly higher degree of utility to society. I shall presently point out how paradoxical this supposition is: but for formal clearness of discussion it is as well to begin by making it; since even on this supposition it can, I think, be shown that there are several distinct cases in which, under a strictly individualistic system of governmental interference, the individual's interest has no tendency to prompt him to the course of action most conducive to the common interest.

§ 2. In the first place, it should be observed that the individualistic argument, even if fully granted, would only justify appropriation to the labourer and free exchange of the utilities produced by labour; it affords no direct justification for the appropriation of natural resources, which private property in material things inevitably involves. Hence, so far as this appropriation of natural resources restricts other men's opportunities of applying labour productively—so far as there is not, to use Locke's phrase, "enough and as good left for others" of the unlaboured commodity appropriated—the appropriation is of doubtful legitimacy, from the point of view of the strictest individualism; and must be regarded as theoretically subject to limitation or regulation, in the interest of the whole aggregate of individuals concerned. How far this limitation and regulation should go must be determined by experience in different departments: but it may be laid down generally that it is the duty of Government as representing the community to prevent the bounties of nature from being wasted by the unrestricted pursuit of

private interest. Thus, for instance, it may properly interfere to protect mines and fisheries from wasteful exhaustion, and save rare and useful species of plants from extermination; and, when necessary, may undertake or control the management of natural watercourses, with a view both to irrigation and to the supply of motive power. And I conceive that measures of a much more sweeping kind in the same direction—including even the complete abolition of private property in land—are theoretically defensible on the basis of individualism; they have, indeed, received the support of thoroughgoing advocates of this doctrine.[1]

Secondly, individuals may not be able—at all, or without inconvenience practically deterrent—to remunerate themselves by the sale of the utilities which it is for the general interest that they should render to society. This may be either because the utility is from its nature incapable of being appropriated, or because—though undeniably important from the point of view of the community—its value to any individual is too uncertain and remote to render it worth purchasing on grounds of private interest. An example of the former is furnished by forests: since private landowners who maintain forests cannot by free exchange exact any return for such benefit as they may confer on the community by its favourable influence on climate in moderating and equalising

[1] The abolition of private ownership of land is not only emphatically advocated in Mr. Herbert Spencer's early treatise on *Social Statics*—which does not altogether represent his later views—it is also suggested as a probable result of industrial development in his later treatise on *Political Institutions*, ch. xv. pp. 540, 541.

I cannot regard as valid the historical reasoning which leads Mr. Spencer to conclude that private ownership of land, having been "established by force" and not by contract, is likely to disappear at a more advanced stage of civilisation. But I quite admit it to be possible that a modern community, while maintaining generally the present merely individualistic character of its laws and institutions, may "resume the communal ownership" of land, giving due compensation to existing owners: though, for reasons which I have elsewhere given (*Political Economy*, Book iii. ch. vi. § 5) I think that the economic disadvantages of such a change would outweigh its advantages, at the present stage of social and political development.

To prevent any misunderstanding, I ought perhaps to state explicitly that I regard the proposal to confiscate the property of landowners without compensation as unworthy of serious discussion.

rainfall. The other case may be illustrated by scientific investigation generally; since most of the advances made in scientific knowledge, even though they may be ultimately the source of important material benefits to man's estate, would hardly remunerate the investigator if treated as marketable commodities, and only communicated to private individuals who were willing to pay for them.

Even where the inconvenience of selling a commodity would not be deterrent, the waste of time and labour that the process would involve may be so great as to render it on the whole a more profitable arrangement for the community to provide the commodity out of public funds. For instance, no one doubts that it would be inexpedient to leave bridges in towns generally to be provided by private enterprise and paid by tolls.[1]

Again, there is an important class of cases in which the individuals have an adequate motive for rendering *some* service to society, but not for rendering as much service as it is in their power to render. These are cases in which competition is excluded by natural or artificial monopoly. Whenever an individual or group of individuals monopolise temporarily or permanently the production or sale of a commodity, the interests of the monopolists may conflict very materially with the interests of the community; since the demand for a monopolised commodity is often of such a nature that a greater total profit can be obtained from the sale of a smaller

[1] Here I may appropriately notice the waste of time and trouble in forming business connexion, which seems inevitable under a competitive system. This may be illustrated by the sums spent by private traders on advertisements and in the promotion of joint-stock companies. Such expenditure constitutes a serious set-off against the economic advantages of competition: and we have to add to this the trouble and time spent in rendering services of comparatively small utility by traders who have not yet established a business connexion, or who are slowly losing business either through the pressure of competitors or through some other industrial change. This latter kind of waste may be prolonged almost indefinitely: since if an uneconomic superfluity of traders has been once established in any department, competition may take effect in distributing business, so as to keep the price of the traders' services high while keeping his remuneration low. The remarkable success of artisans' co-operative stores renders it probable that there is much waste of this kind in the ordinary business of small retail traders.

quantity, owing to the extent to which the price would fall if the supply were increased. The importance of this case, it may be observed, tends to increase as the opportunities for monopoly grow with the growth of civilisation: partly from the increasing advantages of industry on a large scale, partly from the increasing ease with which combination among the members of any class of producers is brought about and maintained.[1]

Combination resulting in monopoly may, as I have just shown, be a source of economic loss to the community. On the other hand, there are cases in which combined action or abstinence on the part of a whole class of producers is required to realise a certain utility, either at all or in the most economical way: and in such cases the intervention of Government, though not the only method of securing the result, is likely to be the most effective method. If, indeed, we could assume that all the persons concerned will act in the most intelligent way, the matter might be left to voluntary association; but in any community of human beings that we can hope to see, the most we can expect is that the great majority of any industrial class will be adequately enlightened, vigilant, and careful, in protecting their own interests: and where the efforts and sacrifices of a great majority might be rendered useless by the neglect of one or two individuals, it would be dangerous to trust to voluntary association. The protection of land below the sea-level against floods, or of useful animals and plants against infectious diseases, are cases of this kind which we have already noticed.

And the ground for governmental interference is still stronger if the very fact of a combination among the great majority of an industrial class to attain a given result materially increases the inducement for individuals to stand

[1] It is noteworthy that economic arguments to prove the advantage of "free competition" commonly assume that the notion of free competition excludes monopoly resulting from combination: and yet the governmental interference needed to repress such combination is manifestly contrary to Individualism as a political principle,—so far at least as the combination is the result of perfectly uncoerced choice on the part of the persons combining.

aloof from the combination. Thus, if it were ever so clearly the interest of shopkeepers to close their shops on Sundays or other holidays, provided the closing were universal, it would still be very difficult to effect the result by purely voluntary combination: since the closing of a great number of shops would obviously tend to throw custom into the hands of the few who kept their shops open.

Even where the need of uniformity is not imperative, voluntary combination is likely to be found inadequate for the attainment of results of public importance, if the interest of any individual in such results is indirect and uncertain; —as may easily be the case even though the public interest is plain and undeniable.

Finally, there are certain kinds of utility which Government, in a well-ordered modern community, is peculiarly adapted to provide. Thus, being financially more stable than private individuals and companies, it can give completer security to creditors; and is thus specially adapted to undertake banking and insurance for the poor, and to bear the responsibilities of a paper currency for the community generally. So again, it enjoys special facilities for collecting and diffusing useful statistical information,—a point of growing importance in modern communities.

§ 3. I have said enough to show that, even in the ideal society of intelligent persons which is contemplated in the traditional argument for *laisser faire*, there is no reason to suppose that a purely individualistic organisation of industry would be the most effective and economical. And the reasons above given largely explain the extent to which in modern States the provision of utilities—other than security from wrong—is undertaken by Government in the name of the community, or subjected to special governmental regulations, instead of being left to private enterprise; on the ground that the interests of the whole community will be better promoted by this arrangement. Thus certain portions of the surface of the globe—the original raw material and instrument of industry—have always been held in common, as obviously more useful when open to

common use and enjoyment, and under common management, so far as management is needed: and the labour required to keep them in good condition has been imposed or provided by Government. Roads, and commons for recreation, come under this head: also seas and large rivers, in which navigation and fishery have been common to all, under governmental regulation; also forests to a considerable extent. And it is to be noted that, in certain important respects, the need of systematic governmental intervention to modify man's physical environment tends to grow as the cultivated area of land extends with growing civilisation: as in the case of interference with the natural flow of surface waters, with a view to better irrigation and drainage, and in that of the artificial maintenance of forests, especially needed on high tablelands and mountain slopes.

Further, in modern civilised communities generally, the private ownership of land is held to be limited by a general right of the community to take compulsorily the land of any individual, when required for the most economic attainment of an important public utility, at the value that it would have had apart from this public need: and in recent times this right has been exercised in very important cases,—the most important being the construction of the artificial roads and waterways which have transformed modern trade and industry. It is true that canals and railways have been largely constructed by private enterprise; but they have usually needed for economical construction the intervention of Government to give the power of buying land compulsorily: and as this power has been granted on account of the public utility of the enterprise, the management of canals and railways—even where it has been left in the hands of private companies—has been placed under governmental regulation, and assumed a semi-public character. That a certain amount of such regulation is legitimate and required in the interests of the community, is admitted even by leading advocates of *laisser faire*. Whether governments should actually undertake the construction and management of railways is a more

doubtful question, on which there has been much divergence in practice: still, important—though not decisive—arguments for this measure are furnished by (1) the value to a political community of facilities for mutual intercourse and rapid communication among its different elements;[1] and (2) the economic advantage of a coherent organisation of railway traffic, and the consequent tendency of railways to fall more and more under the conditions of partial monopoly, so that many of the advantages of competition are lost to the public.

On similar grounds the business of communication by letters and telegrams has been found suitable for Government—chiefly through the economic gain that results from having the whole work done by a single organisation: and it is, in fact, undertaken by almost all modern governments. So again, the ordinary advantages of competitive industry can hardly be realised in providing for the water supply and—by modern methods—for the lighting of towns: accordingly, these businesses, in modern times, tend to assume a semi-public character, being either undertaken by municipal governments or subjected to special governmental regulation. Further, modern governments usually undertake coinage, and regulate in some degree the business of banking:—interventions chiefly justified by the great public importance of giving security and stability to the current medium of exchange.

In a wide sense of the term, these and similar kinds of governmental interference may all be called "Socialistic" in principle; since they tend to narrow the sphere of private property and private enterprise, by the retention of resources and functions in the hands—or under the regulation—of Government as representing the community. Such interference differs very much in intensity in different cases; according as Government (1) merely regulates, and perhaps subvents, or (2) itself undertakes a department of business,

[1] It should be observed that so far as this value lies in the increased ease of maintaining order, it comes rather under the head of the "indirect individualistic" interference discussed in the preceding chapter.

[2] For the purposes of the present discussion, it is not necessary to consider the distribution of functions between *central* and *local* governments; which will be discussed in a later chapter.

or (3) establishes a legal monopoly of the business in its own favour—as in the case of the post-office in England. But the term "Socialistic" may be fairly applied to this kind of intervention, whatever its degree of intensity, if it is used in simple antithesis to "Individualistic." This meaning of the term, however, must be carefully distinguished from another—and I think more common—meaning, in which "Socialism" is understood to imply a design of altering the distribution of wealth, by benefiting the poor at the expense of the rich. For though such effects on distribution may in some cases result from the measures above mentioned, their primary aim is not to give advantage to one section of the community at the expense of another, but to secure benefits to the community as a whole which tend to be distributed among all its members,—though in a way difficult exactly to trace and apportion.

§ 4. The same may be said of much of the public expenditure that most modern communities recognise as desirable for the promotion of education, general, technical, or professional. It is evident that, so far as public funds spent on education tend to make labourers more efficient, though the labourers will be thereby enabled to earn more wages, the employers of labour and the consumers of its products will, generally speaking, share in the gain resulting from the increased efficiency; so that we may regard such expenditure as primarily designed to benefit the community as a whole by improving its production, though much of it has also an important tendency to mitigate the inequalities in the distribution of wealth. It may perhaps be objected that if this expenditure were really profitable to the community, it would be remunerative to individuals to undertake it, and it might therefore be left to private enterprise. But this does not necessarily follow; since the labourers in question or their parents may be unable to provide the requisite means, while the difficulty of making effectual contracts with the labourers or their parents, and the trouble and expense of enforcing such contracts, may suffice to render the provision

of such means an undesirable speculation for other private individuals. On similar grounds, the expenditure of public money in transferring human beings from overpopulated to underpopulated regions, within the territory of the same community, may be ultimately profitable to the community as a whole, from the increased efficiency of the labour thus transferred, although it would not present a profitable sphere for private enterprise. The conditions under which such expenditure is to be recommended, and the distribution of the burden it imposes, will be discussed hereafter, when we come to treat of the expansion of States.[1]

The question of public provision for education is not, however, commonly viewed in relation to industrial efficiency alone. It is widely held to be in the interest of the community at large—and not merely of the poorer classes primarily benefited—that public funds should be employed in the moral and intellectual improvement of its members generally, by the maintenance of religious teaching and worship, and the promotion of scientific and literary culture, through the means not only of schools for the young, but also of museums, libraries, and universities for adults. So far as this view is sound, all such expenditure may be classed as Socialistic in the wider sense above explained.

The propriety of governmental provision for, and regulation of, moral and religious teaching will be more suitably discussed after we have considered the general relations of Law and Morality.[2] The promotion of secular culture might doubtless to a great extent be adequately provided for by private enterprise, if the aim of benefiting the poorer classes, by bringing about a more equal distribution of the capacities and opportunities of living cultivated lives, were left out of consideration. Still a considerable amount of public expenditure under this head may be justified, apart from any such *distributional* aim. In the first place, as we have already observed, the social utility furnished by scientific discoveries is generally unsaleable, except in the cases in which it can be immediately turned to account in some technical invention:

[1] See chap. xviii, § 4. [2] See chap. xiii, § 4.

it is therefore reasonable that a certain number of persons who have proved themselves capable of advancing knowledge[1] should receive salaries from public funds: and that public provision should be made for the costly instruments required for the effective performance of scientific research:—such as libraries, museums, laboratories, observatories, and their equipment. Again, the expenditure of money on educational machinery, to bring opportunities of good scientific instruction within the reach of children of comparatively poor parents who show decided scientific ability, may be justified by the consideration of the increased chance thus obtained of scientific discoveries and technical inventions valuable to the community at large. Similarly, the provision for literary and artistic instruction given by public maintenance of libraries and picture galleries, and endowment of teachers and students, may be expected to benefit the community at large by aiding the development of talents that might otherwise have been crushed beneath adverse circumstances. Moreover, though there is no such need of providing salaries for artists and men of letters generally, as we have seen in the case of *savants*, since the utility of artistic products can be appropriated and sold; still, apart from any special consideration for the poor, it would seem that the advantage to the community of the best attainable appliances for artistic and literary instruction and study has too indirect and remote a connection with the interests of individuals to be safely left altogether to private enterprise. Up to a certain point, then, in all these cases, the benefit of the community as a whole may be taken as the primary aim of the intervention of Government; the advantages accruing from this to any particular section of the community being secondary though not undesigned.

§ 5. Finally, we have to observe that governmental inter-

[1] I do not mean physical science alone: the general argument used would support the endowment of any branch of knowledge which may reasonably be expected to furnish "fruit," beyond the mere gratification of refined curiosity. Whether the mutual relations of the different branches of knowledge are such that none could be properly excluded from the benefit of this argument, is an interesting question which I have not space to discuss here.

vention in the interest of the community, going beyond the mere protection of individuals from mischief, takes place to an important extent in different departments of civil law, as determined in modern states generally, including even those in which Individualism has held the strongest sway. The chief cases of this have been already noted incidentally in previous chapters. Sometimes the occasion for intervention arises on points which do not strictly fall within the limits of the application of the individualistic principle, or cannot be clearly determined by it;—as in the case of the regulation of land tenure, especially in countries incompletely populated, and some of the limitations on free bequest. In other cases the interest of the community at large, as understood in all civilised countries, is held to override the conclusions to which a consistent individualism would lead. A case of this latter class, in the department of property, is found in the limitation in time of literary copyright, as compared with the perpetual protection given to the right of property in material things: since the only tenable grounds for treating the ideal products of intellectual labour differently from the products of labour "embodied" in matter lie in the obvious increase of utility to the community that results from the termination of the literary producer's monopoly, together with the absence of any danger, in the case of valuable literary products, that their utility may be diminished through want of care,—as is largely the case with the material products of labour. But the most important interventions of this kind occur in the department of contract. Thus, in the whole construction of bankruptcy law in modern states, the fundamental individualistic rule of enforcing reparation for the breach of a contract freely entered into is manifestly overriden by considerations of general utility. Still more important are the restrictions on the freedom of connubial contracts, imposed by the marriage laws of modern communities generally; and along with these I may class any legal restraints on the sexual intercourse of unmarried persons, and prohibitions of the sale of pictures, books, etc., provocative of sexual desire; since all such interferences

with freedom are, I conceive, ultimately justified by the paramount interest that the community has in providing for the proper rearing of children. In all these cases, and others that might be mentioned, the interest of the community at large—as distinct from that of the individuals primarily concerned—supplies both the general justification for the legislative and administrative interference required, and the criterion by which any particular questions relating to such interference should be determined.

§ 6. Let us now turn to consider how far the action of government should be directed to the end which would be commonly called "socialistic" in a narrower sense than that in which I have so far used the term,—the diminution of the marked inequalities in income which form so striking a feature of modern civilised societies. It should be observed that some effect of this kind tends to be produced by any successful assumption of industrial functions by Government: since the most marked inequalities of private wealth are due—directly or indirectly—to the unequal distribution of capital (including land), and any successful extension of the industrial functions of government tends to increase the stock of capital owned by the community, and reduce the field of employment for private capital. Accordingly, a main aim of current Socialism in its extremest form—we may distinguish it as Collectivism—is to substitute common for private ownership, and governmental for private management, of the instruments of production in all important departments of industry: so that the payment of interest on industrial capital may cease and "labour receive its full reward." Such a scheme has much attraction for thoughtful and sympathetic persons; not only from its tendency to equalise wealth, but also from the possibilities it holds out of saving the waste and avoiding the unmerited hardships incident to the present competitive organisation of business, and substituting industrial peace, mutual service, and a general diffusion of public spirit, for the present conflict of classes and selfish struggles of individuals. But the consideration of our present experience of public management of

business, as compared with private competitive management, forces me to the conclusion that the latter secures an intensity of energy and vigilance, an eager inventiveness in turning new knowledge and new opportunities to account, a freedom and flexibility in adapting industrial methods to new needs and conditions, a salutary continual expurgation of indolence and unthrift, which public management cannot be expected to rival in the present condition of social morality, and for the loss of which it cannot compensate, except under specially favourable conditions. I am therefore of opinion that—leaving out of account the disturbances of the transition—the realisation of the Collectivist idea at the present time or in the proximate future would arrest industrial progress; and that the comparative equality in incomes which it would bring about would be an equality in poverty:—even supposing population not to increase at a greater rate than the present, as it must be expected to do if work and adequate sustenance were secured to all members of the community, unless measures of a novel kind were taken to prevent the increase.

Holding this opinion, I do not think that a discussion of Collectivism or Socialism in an extreme form falls properly within the scope of the present treatise. But there is an important part of the work actually undertaken by modern governments which must be admitted to be "socialistic" in the narrower sense of the word: that is, which has for its main object — I will not say "the equalisation of wealth," as that would suggest an aim to which the means used are wholly disproportionate, but—the mitigation of the harshest inequalities in the present distribution of incomes. The most obvious examples of this are to be found in the large expenditure incurred in various forms for the relief of the indigent; but I conceive that a part at least of the expenditure on education which modern states generally agree to regard as desirable has been undertaken on this ground, and requires this for its justification. And there is a strong drift of opinion at the present time in favour of further legislation in this direction. I propose, therefore,—

without considering in detail the adaptation of means to ends in particular measures of this kind, or the special dangers and drawbacks attending them—to point out certain general considerations which must to some extent govern our estimate of the expediency of all such schemes.

In the first place, it seems to me indubitable that the attainment of greater equality in the distribution of the means and opportunities of enjoyment is in itself a desirable thing, if only it can be attained without any material sacrifice of the advantages of freedom. The assumption, so far granted for the sake of simplifying the discussion, that the utility to the community of services rendered to the rich may be measured by their market value, cannot be said to have the support of common sense: I conceive, on the contrary, that this authority may be claimed for Bentham's view, that any given quantum of wealth is generally likely to be less useful to its owner, the greater the total of private wealth of which it forms a part. It is a fundamental economic principle—illustrated almost universally by the effect of an increase of supply on the price of any article—that the utility of a given quantum of any particular commodity to its possessor tends to be diminished, in proportion as the total amount of the commodity in his possession is increased; and Bentham's proposition is merely an extension of this principle to the aggregate of commodities which we call wealth.

There are, no doubt, counterbalancing considerations which ought not to be overlooked. Any great equalisation of wealth would probably diminish the accumulation of capital, on which the progress of industry depends; and would deteriorate the administration of the capital accumulated; since the most economic organisation of industry, under existing conditions, requires capital in large masses under single management, and the management of borrowed or joint-stock capital is likely to be, on the average, inferior to that of capital owned by the manager. Moreover, the effective maintenance and progress of intellectual culture—which is a necessary condition of its effective diffusion—seems to

require the existence of a numerous group of persons enjoying complete leisure and the means of ample expenditure; since the disinterested curiosity that is the mainspring of the advance of knowledge, and the refinement of taste that leads to the development of art, can hardly find free play and the fostering influence of sympathy except within such a group, although they may be found in a high degree in individuals outside it.

Still, after allowing all weight to such arguments as these, it seems to me paradoxical to doubt that at least a removal of the extreme inequalities, found in the present distribution of wealth and leisure, would be desirable, if it could be brought about without any material repression of the free development of individual energy and enterprise, which the individualistic system aims at securing. When from this point of view we examine the various legislative measures which have a "Socialistic" aspect—in the narrower sense of appearing to aim at a diminution of inequalities of wealth—we find that they differ very markedly in the manner and degree in which they come into conflict with the principle of Individualism. Some of these measures must be admitted to diminish the inducements to industry and thrift, without any counterbalancing tendency to stimulate labour by enlarging its opportunities; they simply and nakedly take the produce of those who have laboured successfully to supply the needs of those who have laboured unsuccessfully or not at all. I am afraid that the English system of poor relief—though it has many merits that ought not to be undervalued or lightly lost—must be admitted to have this fundamental defect. Others again involve restrictions on freedom that are frankly and uncompromisingly anti-individualistic; to this class belongs the proposal to fix by law a maximum length of day's labour for adults—that is, to prevent any individual labourer from rendering the amount of service to society which he and his employer agree in thinking it their common interest that he should render.[1] But there are other measures de-

[1] I conceive, indeed, that such a measure might be justified, in case the excess of daily labour prevented was injurious to the labourer's efficiency, so

signed for the benefit of the poor which do not come under either of these heads, measures of which the primary aim is not to redistribute compulsorily the produce of labour, but to equalise the opportunities of obtaining wealth by productive labour, without any restriction on the freedom of adults. State aid to emigration is an example of this class, and a part at least of the expenditure on education must be held to belong to it. Now measures of this kind, however Socialistic, are not in their primary aim opposed to Individualism; since we obviously increase instead of diminishing the stimulus to self-help and energetic enterprise by placing a man in a position to gain more than he could otherwise have done by the exercise of these qualities. In fact, in the general reasoning by which political economists have tried to prove that *laisser faire* supplies the greatest possible stimulus to the development of useful qualities, equality of opportunity has often been tacitly assumed—or at least, the loss to the community arising from the restricted opportunities of large masses has been tacitly overlooked. So far as the community, acting through its government, can equalise opportunities, without doing harm in any other way, such interference actually gives greater scope for the admitted advantages of the individualistic system to be attained.

"But," it may be said, "this equalisation of opportunities —as *e.g.* by State aid to education or to emigration—inevitably costs money and usually a good deal of money, which has to be raised by taxation; and thus in its taxational aspect it comes to be opposed to the individualistic principle, though it may not be so in its primary aim. A portion of A's income has to be taken to enable B to labour under better conditions, and in this way that absolute security to the fruits of the individual's labour, at which individualism aims, is inevitably impaired."

that the average effectiveness of a day's labour might be expected not to be materially diminished by the restriction. But so far as the admitted effect of the measure is to diminish materially the amount of daily service rendered by the labourer to society, I think that no government ought to take the responsibility of causing the consequent loss of wealth to individuals and to the community as a whole.

It cannot be denied that this is to some extent the effect of all expenditure in the interest of the poorer classes which is defrayed from funds raised by general taxation. On the other hand, it must be borne in mind that—as was before said—the institution of private property as actually existing goes beyond what the individualistic theory justifies. Its general aim is to appropriate the results of labour to the labourer, but in realising this aim it has inevitably appropriated natural resources to an extent which, in any fully peopled country, has clearly transgressed Locke's condition of "leaving enough and as good for others." In any such country, therefore, the propertied classes are in the position of diminishing the opportunities of the unpropertied in a manner which—however defensible as the only practicable method of securing the results of labour—yet renders a demand for compensation justifiable on the strictest individualistic grounds. I hold that such compensation may fitly be given by well-directed outlay tending either to increase the efficiency and mobility of labour, or to bring within the reach of all members of a civilised society some share of the culture which we agree in regarding as the most valuable result of civilisation: and in so far as this is done without such heavy taxation as materially diminishes the stimulus to industry and thrift of the persons taxed, this expenditure of public money, however justly it may be called Socialistic, appears to me defensible on the ground of Individualistic theory, as the best method of approximating to the ideal of Individualistic justice.

§ 7. But such provision as has been found practicable for equalising opportunities of labour is not, in any modern state, sufficient to protect the whole population from the evils of extreme indigence. In most modern states an important percentage of the population are, at any given time, temporarily or permanently incapacitated from providing themselves with the necessaries of life. In many cases no doubt this incapacity is due to some kind of marked ill desert—such as drunkenness, or loss of employment through neglect of duty—and probably in most cases it might have

been avoided by patient industry and thrift. But in an important minority of cases the affliction of indigence is due to misfortunes which the persons afflicted cannot reasonably be blamed for not foreseeing; and even where this is not the case, probably few individualists are able to regard starvation as the appropriate penalty for improvidence, or even for worse faults; while, again, the inexpediency of leaving the relief of indigence entirely to unsystematised private almsgiving—liable as that is to "do too much or too little," and to be largely imposed upon—is now generally recognised. The problem, therefore, must be taken in hand by Government in some manner and degree. On the other hand, the simple course of securing the indigent adequate relief from public funds—even if such relief is limited to the bare necessaries of life—involves the risk of a serious diminution of the inducements to industry and thrift in the case of persons struggling on the verge of indigence.

The grave difficulties of the problem thus presented to Government are recognised by all thoughtful persons, and it is not surprising that widely different methods should be proposed, and to a great extent adopted by different Governments, in dealing with these difficulties. The plan involving the minimum of divergence from individualism is that in which Government provides an agency for the systematic and careful relief of indigence, but requires it to be supported by voluntary contributions. This, in the main, is the French system; it has the advantage of avoiding, so far as it operates, the demoralisation and waste caused by mendicity and unregulated private almsgiving, without incurring the evils of taxing the industrious and thrifty for the benefit of the idle and improvident. But its efficiency, depending as it does on the adequacy of the spontaneous gifts of individuals, is inevitably precarious; and, where imprisonment is an ordinary punishment for crime—as it is in modern states generally—this system, if exclusively adopted, would always be liable to the objection that the Government guarantees to criminals a provision for their physical needs which it refuses to non-criminals. This objection is avoided

by the English plan; which secures adequate sustenance from public funds to all persons who are in complete destitution, while it aims at minimising the encouragement thus offered to idleness and unthrift by attaching unattractive—though not physically painful—conditions to the public relief given to ordinary adult paupers. The most serious drawback of the English system is that the required combination of unattractiveness with sufficiency of provision for physical needs is shown by experience to be only attainable by insisting that the recipient of relief shall submit to the constraints of a "workhouse"; but it would be unpractically severe to insist on this condition in the temporary disablement of breadwinners through sickness or accident, while to dispense with it even in these cases involves a serious discouragement to providence. This latter evil is avoided by the German method of compulsory insurance. This method, it may be observed, involves governmental interference, which is in one aspect greater than that entailed by the English method, since the provision compulsorily made extends to labourers generally, whereas the English system only provides for the destitute: on the other hand, the method of compulsory insurance is, from another point of view, less anti-individualistic, so far as the burden of the provision is thrown on the persons who receive the benefit of it.[1]

Probably a careful combination of the three methods that I have briefly distinguished—regulated private almsgiving, public relief, and compulsory insurance—would at present give us the practically best plan of dealing with the problem of pauperism. How the whole function of poor-relief should be distributed among the three methods is a question that, I am glad to say, arouses a steadily increasing interest at the present time; but it is difficult to give to it a general theoretical answer of any value, and modern societies

[1] This is only to a limited extent the case in the system actually adopted in Germany: but it would be nearly attained if the plan of insurance against sickness and old age, which has for many years been ably and energetically advocated by Canon Blackley, were successfully carried into effect.

generally will be better able to answer it practically in a few years' time, through the full experience which will then have been obtained of the working of the recent German legislation that has provided national insurance for sickness, disablement, and old age. Here I will only say that the proper nature and limits of governmental action for the relief of indigence must depend upon (1) the actual extent and effectiveness of voluntary association among the citizens, and (2) on the amount of philanthropic effort and sacrifice habitually devoted by private persons to the supply of social needs, and the wisdom with which these efforts and sacrifices are directed. A similar observation may be made in reference to other departments of the interference of Government, which I have called "socialistic"—whether in the wider or the narrower sense of the term. Thus we actually find that the promotion of education and culture, and the cure of diseases, have been largely provided for in modern civilised communities—though to an extent varying very much from one state to another—by the donations and bequests of individuals. So far as these needs can be adequately met in this way, there is an advantage in avoiding the necessity for additional taxation, which hardly needs demonstrating, but which will be brought prominently before the reader's mind in the course of the next chapter. And it ought here to be noted that if the State intervenes at all in any department that has been hitherto left to private beneficence, there is a serious danger of the latter withdrawing from it, unless the spheres of action appropriate to the two agencies respectively are well and clearly defined; since men who will spend money freely to provide for a social need which would otherwise remain unprovided for, will not be equally disposed to spend it to reduce the drain on the public treasury.

Finally, in determining the proper limits of the kind of governmental interference discussed in this chapter, we have to take into account certain disadvantages attaching to governmental action of which the precise nature and importance will vary with variations in the structure of

government, and in the relations established—whether by constitutional law or constitutional morality—between the governors and the governed. I mean such disadvantages as (1) the danger of overburdening the governmental machinery with work,[1] (2) the danger of increasing the power capable of being used by governing persons oppressively or corruptly, (3) the danger that the delicate economic functions of government will be hampered by the desire to gratify certain specially influential sections of the community:—for instance, when legislation is in the hands of a representative assembly, the more the functions of Government are extended in a socialistic direction, the greater becomes the risk that contested elections will exhibit an immoral competition between candidates promising to procure public money for the benefit of particular classes and districts. When, along with these dangers, we take into account that the work of government must be done by persons who—even with the best arrangement for effective supervision and promotion of merit—can only have a part of the stimulus to energy and enterprise which the independent worker feels, it will be easily understood that we are not justified in concluding that governmental interference is always expedient, even where *laisser faire* leads to a manifestly unsatisfactory result; its expediency has to be decided in any particular case by a careful estimate of advantages and drawbacks, requiring data obtained from specific experience, which it does not come within the scope of this treatise to give.

[1] As I shall explain in chapter xix, the disadvantages of increasing the work of government may be in some cases avoided by placing public funds and functions in the hands of private corporations under governmental supervision.

NOTE.—It has seemed to me most convenient to reserve the consideration of governmental interference with foreign trade—of which the reader may naturally expect to find a discussion in the present chapter—until I come to treat of the "Principles of External Policy" (chap. xviii).

# CHAPTER XI

## THE MAINTENANCE OF GOVERNMENT

§ 1. In considering the individualistic minimum of governmental interference, I passed over one branch of it which all would admit;—the function of providing for the defence of government against attack, and procuring the means necessary for its support and for the adequate discharge of its other functions. I passed this over for the time as being secondary and derivative: for the cost in money, coercion, or otherwise, that is generally needed to keep up any part of the work of government is obviously in itself a sacrifice, which only becomes justifiable when the work for which it is imposed has been shown to be either necessary or sufficiently useful to be worth the cost. On the other hand, the consideration of cost may be of decisive importance in determining the limits of governmental action:—since here, as in private affairs, the question whether a certain utility should be sought in a certain way may depend on the price that has to be paid for it. In any case it seems desirable at this point to consider (1) the restraints which it is expedient to place on private individuals, in order to protect Government against attack, and to render its discharge of its functions more efficient,[1] and (2) the manner in which the personal services and the material commodities required for governmental work should be obtained.

[1] The restraints to be placed on Government, to secure the protection of private individuals against governmental oppression or extortion will be more conveniently considered in the second part of the treatise.

Under the first head we may begin by assuming that the life, health, reputation, etc., of persons exercising governmental functions will receive protection similar to that afforded to private individuals by such a system of law as has been sketched out in the preceding chapters: and we may make a similar assumption with regard to the land or other wealth which Government manages as "public property,"—either as being necessary to the performance of governmental functions, or most generally useful when held in public ownership. These points need no argument: and it is also obvious that any overt resistance to governmental officials in the discharge of their legitimate functions should be effectively repressed:—though, of course, when such an official has exceeded his lawful functions in applying coercion to any private individual, reparation should be made to the latter for any injury he may have suffered from the unlawful aggression, and punishment should be inflicted on the aggressor if his excess has been wilful or grave. It is more doubtful how far a private person is to be held justified in resisting what he believes to be unlawful aggression on the part of a governmental official, just as he would resist similar aggression on the part of a private individual. It seems most simple and logical to lay down that an official acting illegally loses all advantage of his official character, so far as this action is concerned: still there are important grounds for limiting the right of self-defence more narrowly where the apparent aggressor is an officer of government: since a conflict of force between a private person and a governmental officer is more disturbing and dangerous to social order than a similar conflict between private persons; again, in the former case there is a general presumption that the apparent aggressor is better acquainted with the limits of his legitimate functions than the private individual whose rights he apparently invades: finally, reparation is somewhat more secure [1] in the case of aggres-

[1] I assume, of course, a state of society in which the relations of government and governed are so far well ordered that the supreme Government may be trusted to repair wrongs committed by its subordinates. The constitutional means for securing this result will be considered in the latter part of this treatise.

sion by a governmental officer than it is in the case of private aggression, since the private aggressor may escape. On the whole, then, it would seem expedient that the legal right of self-defence against aggressions of governmental officials should, as far as possible, be limited to cases in which the illegitimacy of the official's attack is manifest and unmistakable, or the injury threatened irreparable.

I have been speaking above of strictly legal rights of resistance, as conceivably exercised against subordinate officials. The consideration of the constitutional[1] or moral right of private persons to resist oppressive action on the part of a supreme organ of government will come more properly at a later stage of the discussion; for which I also reserve the important question how far special restraints should be imposed on freedom of speech and freedom of association of private individuals in order more completely to guard against the danger of seditious resistance to the supreme government.

Leaving the question of open resistance and incitement to resistance, it may be laid down further that any attempt to prevent or pervert the exercise of any governmental powers by bribing or in any way threatening the officials concerned should be severely repressed; and, generally, any dangerous attempt to throw obstacles directly or indirectly in the way of the discharge of governmental functions should be prohibited under penalties, unless for special reasons it should appear that such penal interference would be likely to be attended with evils outweighing its advantages. The most difficult question under this latter head relates to the assistance that relatives and friends are prompted to render to criminals desirous of escaping justice. Such assistance should certainly be viewed generally as a breach of social duty; but to punish it with unrelenting rigour would bring the law into harsh—and somewhat demoralising—collision with the affectionate feelings and habits of mutual service which powerfully move men to aid

[1] It is obvious that there cannot be a strictly legal right of resisting a supreme legislative organ of government.

near kinsmen or intimate friends in distress. On the whole, it is probably best to reserve the punishment of "accessories after the fact" for the gravest class of crimes, and even in this case to exempt from punishment the mutual secret aid of husbands and wives, or children and parents.

§ 2. Let us now proceed to a general survey of the means by which the personal services and material commodities required by government are to be provided. It must be admitted that, in some respects, this survey would come more appropriately after we have discussed the external relations of political communities, and the important governmental functions connected with them;—since, in most modern states, the larger share of the cost of government is caused by these functions. On the other hand, however largely the expenditure of government may be due to its external relations, the burden of providing the required supplies must fall almost entirely within the community: foreign tributes, whether exacted politically or — under exceptional circumstances—obtained by taxing foreign trade, can rarely amount to more than a small fraction of such supplies. I propose, accordingly, to introduce the discussion of the resources of government here; though in so doing I must to some extent anticipate the aspect of governmental work, which will come more fully before us in subsequent chapters.

The commodities required by government may be divided into (1) Personal services, (2) Material products of labour, and (3) Natural resources, especially land and its contents. Of these the third class may have belonged to the community from the first, and never have been permitted to be appropriated by individuals: it is only with regard to the first two classes that the questions necessarily arise whether they are to be obtained (*a*) voluntarily or compulsorily, (*b*) gratuitously or by purchase. For the higher parts of the work of government, if they do not involve continuous and fatiguing labour, the required services are likely to be obtainable without either compulsion or pecuniary emolument; as the dignity and power attached

to such work renders it sufficiently attractive to a sufficiently large class. Whether this arrangement is desirable depends chiefly on the further question whether it is expedient that the work should be wholly or mainly in the hands of persons of comparative wealth and leisure:—a question of which the consideration belongs rather to the second part of this work which treats of the structure of government. And similar considerations are important in the more numerous cases in which either compulsion or payment is necessary to obtain the required services. Thus an important reason, commonly alleged for making it compulsory, generally speaking, on Englishmen of at least moderate means to serve on juries, is that the judicial functions allotted to the jury would be less satisfactorily performed if they were allowed to fall into the hands of a professional class.

So again, it is urged in favour of compulsory military service, that it diminishes the constitutional dangers involved in the existence of a large standing army, since conscripts are less likely than professional soldiers to be seduced into subserving the ends of unconstitutional ambition. Still I conceive that where compulsory military service is rightly introduced, the decisive reason in its favour is the economical reason, that the army required is too large to be raised by voluntary enlistment except at a rate of payment which would involve a greater burden in the way of taxation than the burden of compulsory service. For where the number of soldiers and sailors required for warlike purposes is not large in proportion to the population, and can be obtained for moderate remuneration, voluntary enlistment has great advantages from a utilitarian point of view; since it tends to select the persons most likely to be efficient soldiers and those to whom military functions are least distasteful; both which advantages are lost by the adoption of the compulsory system. Accordingly, no one would propose to apply this system to the police or civil service in any modern State.

At the same time, where there is no regular compulsion to military service, the duty of aiding personally, if required, in

the defence of the community against foreign enemies, ought to be recognised as incumbent upon citizens generally: since no one can say how much of the available physical force of the community may be imperatively needed in a crisis of war, and it is desirable that whatever demands may be made upon it should be cheerfully and promptly met. Similarly, the aid of private persons—not in governmental employment—may be on exceptional occasions needed for the maintenance of order, and for the prevention, detection, and punishment of crime: accordingly, a general obligation to render such services, when required to do so by lawful authority, should be legally established: though, on the general principle of division of labour, it seems expedient that these functions should be (as far as possible) left in the more expert hands of a carefully organised and disciplined body of governmental employees.

Even where military service is compulsory, the support and equipment of all, except a comparatively small minority of well-to-do persons, must be defrayed from the funds of the community: and it is obvious that whatever services the public obtains voluntarily must receive adequate remuneration from the same funds—except in the case of the dignified and comparatively unfatiguing posts before mentioned, or where the services are only occasional, and demand but a small expenditure of time.

Similarly, the cost of the material products of human labour required for governmental use, whether purchased, or manufactured in governmental establishments,[1] must be borne by the public treasury: and where they are purchased it is generally expedient that they should be obtained by free exchange at their market-value: as any compulsory reduc-

[1] Generally speaking, it is best that Government should obtain by purchase the material products of labour that it requires, owing to the general superiority of private industry, under the condition of open competition. But in the case of costly articles of which Government is the only consumer—such as cannons and ironclads—the advantages of competition may be difficult to obtain: and there may be special preponderating reasons in favour of governmental manufacture,—as when the quality of the article is very important and at the same time difficult to test if obtained by purchase, or where systematic and costly experiments in production are required.

tion of the price paid for them would either discourage their production or would be an inconvenient way of indirectly taxing the consumers of similar products.

The case is otherwise when the commodity required is land or other natural utility, not due to human industry. Here the primary question is not how the Government is to be supplied with such conditions, but rather how far it is desirable that it should retain possession of them. Actually, as we saw, in newly colonised countries, all the land with its contents is rightly treated as originally the property of the community: and much of the land that now belongs to the public, in modern European communities, has never been private property; while other portions have been the semi-private property of royal families, and have thus gradually acquired the character of public property, as the monarchy changed from a feudal or semi-feudal to a modern institution. No doubt where there are valid reasons for *retaining* such land in public ownership—whether because it is required for the due performance of governmental functions, or because it is likely to be more useful under governmental management — there would also be strong reasons for *acquiring* it, if it were in private hands: only where it is already public property, the important further question whether it is to be obtained compulsorily or by voluntary exchange does not arise. Where, however, this question does arise, I hold it expedient in the special case of land that the community should have the right of compulsory purchase; because there is nothing to be gained here—as there is in the case before discussed of the products of labour—by allowing the owner of land to profit by the need of the community.[1]

§ 3. The peculiar relation of the community to land, as contrasted with other species of wealth, appears again when we consider the sources from which the funds required for governmental purchases are to be obtained. For one such source, historically of much importance, is the rent of the land. So far as this rent is a price paid for utilities that

[1] This question will be more discussed in the next chapter.

are not due to human labour,—or are an indirect result of labour spent for other objects, and incapable of being appropriated by the persons whose labour has caused them,[1]—the appropriation of such rent by government on behalf of the community is theoretically quite in harmony with individualistic principles: but the difficulty of securing for public uses this "unearned" rent without at the same time confiscating the earnings of human labour and enterprise is very great, and perhaps insuperable. And in any case, where land has become private property, the financial operation required to transfer its unearned value to public ownership, with due compensation[2] for existing rights, could not be safely undertaken, unless the time at which the community would enter upon the enjoyment of its ownership were postponed to a distant date: so that for this reason alone—apart from the difficulty before noticed—the plan of defraying any considerable part of governmental expenditure from the rent of land is not within the range of practical politics for modern States generally.

We may therefore assume that by far the greater part of the funds required by Government must be raised, in the long run, by the contributions levied from private persons which we may broadly call taxes. But large supplies may be obtained temporarily, by Government as by individuals, through loans: and, in fact, a considerable part of the taxes now levied in most of the leading European States is required to pay interest on such loans. Speaking broadly, such borrowing is legitimate for governments under conditions similar to those under which it would be prudent for private persons: either (1) when the loan is employed productively, so that interest may be paid and a certain portion of the principal annually repaid out of the profit made by the use of it; or (2) where it is employed to meet an occasional necessity for enlarged consumption, which could not be met

[1] As, for instance, when the successful introduction of a new manufacture into a district causes an increase of population, and a consequent rise in the value of neighbouring land generally.

[2] I have already said that the proposal to take it without compensation does not seem to me to deserve discussion.

without painful sacrifices out of the income of a single year. Productive outlay, again, may be either financially profitable, when the loan is employed in some business carried on by Government, of which the profits go directly to the treasury; or it may be only profitable socially by increasing private incomes: in the latter case it has to be considered whether the extra taxes which it will necessitate will not involve disadvantages outweighing the gain. At any rate the increased receipts accruing to the community in consequence of such outlay ought obviously to be at the very least sufficient to repay the loan with interest by the close of the period required to exhaust the productive effects of the outlay. A similar general principle is, I think, theoretically incontrovertible in the—practically more important—case of unproductive borrowing to meet an occasional need of extra expenditure: the number of years over which the sacrifice imposed by the emergency may safely be extended ought to be limited by the condition of paying off the loan before a similar emergency may be expected to occur again. But in practice the application of this principle is very difficult: since the chief emergencies which necessitate such loans are foreign wars, and we have at present no means of forecasting scientifically the magnitude and frequency of a nation's future wars. In these circumstances, it seems most prudent to infer the probability of future wars from past—especially recent—experience: and if so, the principle above laid down is manifestly being transgressed by more than one of the leading nations of modern Europe:—a transgression which can only be partly excused by the probability that the future increase of national wealth and the tendency in the rate of interest to fall will reduce the burden of any national debt already contracted.

To discuss more in detail the effects of loans, or the right mode of raising them, would be inappropriate in such a treatise as this. And it also seems to me best, in passing to consider the central question of this chapter—the question of taxation—to omit such topics as belong rather to the special spheres of political economy or technical finance.

Accordingly, I shall not discuss the applications of the elementary maxims that "every tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay it," and that every tax ought to be so contrived as to inflict as little extra sacrifice as possible on the contributor, over and above the sacrifice of the money that it brings into the public treasury.[1] I will only observe that in carrying out the latter maxim we have to consider not only the expense to Government of collecting taxes, and the trouble and annoyance entailed by the process of collection, but also the economic loss to the community that may be caused by the effect of the tax in modifying the processes of industry and trade: indeed, it is to this latter kind of loss that special attention should be directed by theoretical writers, as it is more liable to be overlooked. But it belongs rather to the political economist to develop the importance of this consideration, and to apply it to particular cases: in a treatise on General Politics what most concerns us is to seek for a clear view of the equitable principles on which the burden of taxation should be distributed.

§ 4. We may conveniently begin by trying to define a "tax." The widest notion attached to the word would seem to be "a compulsory payment to Government that is not penal": only it must be observed that what we agree to call "taxes" on consumable commodities are for the most part not absolutely compulsory, as any individual may escape them by abstaining from the consumption of the commodities. On the other hand, we certainly do not include under the term "tax" all payments made by those who purchase any commodity of which the sale is controlled by Government: for we do not consider ourselves taxed by the charge for postage-stamps—except so far as it exceeds the market-price of the service of conveyance for which the charge is made; though it is neither more nor less compulsory than the

[1] These are, substantially, the third and fourth of Adam Smith's famous maxims: but the statement of the fourth has been modified in order that its scope may more legitimately include the "trouble, vexation, and oppression" which Adam Smith does actually make it include.

charge for a receipt-stamp, which is undoubtedly a tax. In short, a payment for a governmental service not priced above its market-value is not commonly reckoned a tax, if rendered to the payer by his own choice, even though Government has a monopoly of such services. And it is, I think, doubtful whether even a compulsory payment of this kind, for a specific service definitely appropriated to the payer:—for instance, a compulsory rate for water supplied by the Government, not exceeding the market-value of the supply,—would ordinarily be called a "tax." I think usage here becomes uncertain. But, in any case, whatever term we might use, I think that we should be broadly agreed as to the equitable principle for apportioning such payments for specific services capable of being definitely appropriated to the payers: it would be held that the payment ought to be proportioned to the amount of the service[1] rendered, as closely as is consistent with the most economic management of the business of rendering such services.

These considerations lead us to one interpretation of the accepted principle of "equality of taxation." It is obvious that the "equality" here spoken of is a proportional equality of some kind:—it is not meant that every one should pay the same sum;—and since, in a well-governed community, all taxes are payments for services rendered by Government to the governed, it seems in accordance with equity that the distribution of the payments should correspond as nearly as possible to the distribution of the services. And I think that this principle should certainly be adopted, so far as there is a substantial and definitely ascertainable inequality in the benefits conferred by the action of government on different sections of the community: for instance, it should be applied in defraying the cost of roadmaking and other improvements, and generally, in determining the incidence of local rates and taxes. But I regard it as only applicable to a very slight extent, in the case of the most im-

[1] There would be less agreement as to whether "amount of service" is to be measured by *cost* or *utility*: and the difference between the two measurements still leaves a considerable margin of possible variation. See my *Political Economy*, Book III, chap. viii. § 4.

portant, and actually most costly, functions of government: because the utilities provided by these functions cannot be apportioned, with even approximate exactness, among the individual members of the community. And this is, I think, implicitly recognised in the common use of the term "tax": since it is just in the cases where the individual's payment to government fails to correspond to an *individualised* governmental service, that the applicability of the term is most clear and unmistakable. Take, as a leading example, the case of defence against foreign foes: considering the mildness—as regards individuals—of modern civilised warfare, it cannot surely be maintained that the object of warlike expenditure is mainly the protection of the life and property of individuals: and though it is undeniable that different classes in the community are interested in very different degrees in the maintenance of national existence, or national honour, or prestige or power, it would be idle to attempt to frame an estimate of these different degrees of interest which could be taken as a basis of distribution of taxation.

So again, it is no doubt true that (*e.g.*) judges and policemen are continually engaged in rendering specific services to certain individuals: but since—as Bentham and Mill urge—"those who are under the necessity of going to law are those who benefit least, not most, by the law and its administration," it would be manifestly unjust that the cost of the judicature and the police should fall exclusively on the persons who are compelled to demand their direct assistance. And it seems impossible to apportion with any exactness the benefits of "law and order" among the rest of the community, who are indirectly protected by judges and policemen. At the same time, I think that the principle of proportioning payment to services rendered may reasonably be applied, to some extent, in defraying the general cost of protecting property:—as (*e.g.*) by making the payment of stamp duties on instruments and records of transfer a necessary condition of the admission of such documents as evidence in courts of justice. But stamp duties are a very rough

mode of proportioning payment exacted to protection given: and at any rate as regards the greater part of the taxation of a community, we have to seek for some other principle.

§ 5. The only remaining acceptable principle—assuming that communistic aims are excluded—seems to be that of simply equalising, as far as possible, the burden or sacrifice that taxation imposes on individuals. Adam Smith's maxim that taxation should be proportioned to income or revenue is perhaps designed to realise on this principle: but reflection will show that the realisation can only be very imperfect; since the needs of different classes of contributors with equal incomes are very different, and the sacrifices imposed by contributions proportioned to income tend to differ accordingly. In the first place, needful expenditure on the instruments of a man's handicraft, trade, or profession, should obviously be subtracted from his income before it is estimated for the purposes of proportionally equal taxation: on the other hand, the line between this and expenditure for enjoyment is often obscure, especially in the case of professions — the library of a teacher or writer, the carriage of a physician, the travels of an artist, are partly sources of professional earnings, but partly also of enjoyment. More important still and more obvious is the greater burden imposed on fathers of families as compared with bachelors by the same tax: and here we may also notice the greater proportional burden—incomes being the same—of the worker who has to save for children, or his own old age, as compared with the owner of capital. Most important of all is the manifestly greater burden that taxation proportioned to income throws on the poorer classes. Indeed, if equalisation of burden were the sole consideration, the equity of a graduated ratio of taxation, rapidly increasing as incomes rise, could hardly be denied: the serious objection to such a measure lies in the danger of economic loss to the whole community caused by checking accumulation or driving capital from the country. There is no similar danger in what has been called a "degressive" as distinct from a "progressive" taxation: that is, taxation graduated at the lower but not the upper

end of the scale of incomes, so as to be roughly proportioned not to total income, but to income *minus* necessary expenditure. And there is a strong argument for adopting this degressive graduation, in a community where indigence is relieved from public funds. For if Government risks some of the evils of communism in order to secure the poorest citizens from want of the necessaries of life, consistency requires that it should not endeavour to *take* by taxation from the poor who remain independent a part of what it would have to *give* them if they sought its aid: and if, on this ground, we exempt from taxation incomes below a certain minimum, it would be unreasonable to tax those just above this minimum in proportion to income,—since persons who could only earn a little more than the minimum would thus be liable to lose the *whole* of what they earned.

On the whole, then, I conclude that we ought to treat as taxable only that portion of any individual's income that is not required to provide necessaries either for the personal consumption of himself and those dependent on him, or for the efficient performance of his work. But, owing both to the difficulty of defining necessaries and the complicated differences in the needs of different persons, it would be very hard to conform to this rule with even approximate accuracy in any system of direct taxation of superfluous income:[1] and probably the best method of realising it is by taxing small incomes only indirectly, through taxes on consumable articles that are not necessaries; a method which has the advantage of enabling those persons whose needs are greatest to lighten their own burden by abstinence not dangerous to health; though it must be admitted that it is also liable to entail serious inequalities, from the variations in taste, constitution, and habits of different consumers. Still this objection is less important, as we must in any case be content with a very rough approximation to equality of burden.

In taxing commodities, it is generally expedient to select

[1] There are also technical objections to an income-tax extending to small incomes, owing to the comparative costliness of the process of levying it.

articles of which the consumption is not likely to be restricted to any great extent by the tax; since all such restrictions tend to cause loss of utility to the public over and above the gain to the treasury. But some restriction is inevitable: hence the special advantage of taxing commodities like alcoholic liquors and tobacco, which tend to be largely consumed in excess of what is salutary. It is to be observed, however, that such commodities usually occupy an increasing portion of non-necessary consumption, as we descend in the scale of wealth: therefore, in order to proportion the taxation of different classes as nearly as we can to their superfluous incomes, we shall require further taxation of the middle and upper classes—either directly, by an income-tax in the narrower sense, or by taxation of the special luxuries of such classes.

This leads me to notice another difficulty in equalising burdens. It is urged that direct taxation, being inevitable, is a greater burden than an equal amount of taxation voluntarily incurred by purchasing commodities. And I think that this cannot be denied; on the other hand, the amount of the extra burden cannot be definitely calculated. Perhaps we may take this inequality as roughly balanced by the loss that the voluntary tax-payer generally incurs beyond what he pays to the treasury, through the inevitable interference with the process of supplying the commodities taxed.

So far I have assumed that the burden of taxes—whether direct or indirect—will be borne by the persons on whom Government designs to impose it; and, speaking broadly, I think this will be the case with the taxes so far suggested. I do not conceive that any considerable part of the taxation proportioned to non-necessary expenditure has any important tendency to be transferred from the persons on whom it is intended to be imposed to other classes in the community, whether it takes the form of an income-tax in the narrower sense, or that of taxes on commodities:—so far as these latter are practically paid by the consumer, which may be taken to be in the main the case with taxes imposed for revenue only, when they have been some time estab-

lished.[1] A new tax on any article of luxury is doubtless liable to fall to some extent on those who supply the article; which is a reason on the ground of equity for avoiding frequent changes in this department.

The clearest case of transfer of burden is that of a special tax laid on land (or any other species of durable wealth). It would be clearly contrary to equity to impose such a tax, in a modern community—except as payment for special utilities furnished by Government to landowners, etc.; but, supposing such a tax to have been imposed some time ago, then to whatever extent land has been sold since it was imposed, the injustice would not be repaired by taking it off now; since, so far as the tax is taken into account by the purchaser, it practically remains a burden on the original owner even after the sale, and not on the purchaser.[2] Hence such a tax, when of old standing, should be regarded as a portion of rent reserved by the community, and not taken into account in distributing the burden of taxation.

It seems also right to treat taxes on inheritance as quite *sui generis;* since neither the economic nor the equitable considerations that ought ordinarily to be decisive in distributing taxation are applicable to this case—at least in the ordinary manner and degree. In the first place, Government, by taking a portion of what would otherwise have come to a man by inheritance, in no way diminishes the motives that prompt him to produce and accumulate wealth —if anything, it tends to increase these motives; nor does it necessarily cause even any disappointment of expectations, except when the tax is first imposed. A heavy tax on in-

[1] A certain share of the burden of such taxes will be borne by the owners of land or other natural agents employed in the production of the commodities taxed: and this should receive consideration in any fresh taxation of the kind. But this share will not generally be large or definitely ascertainable in the case of taxes of old standing imposed for revenue only: and it need the less be taken into account in the case of such taxes for the reason given in the next paragraph.

[2] I do not take account of transfers by inheritance; since, where children have inherited, it may reasonably be supposed that they would have got more if there had been no tax: so that they may fairly be regarded as still paying it.

heritances may indeed diminish the inducements of prospective testators to industry and thrift: but its bad effect in this way is not likely to be considerable, so long as such taxation is kept within the limits which the danger of evasion by gifts from the living to the living practically imposes on the financier: and this latter danger will generally be much less where there are no children or other direct descendants to inherit. Hence it seems expedient, in the case of these taxes, to give up the ordinary aim at equality of incidence, so far as to tax more heavily wealth inherited by others than direct descendants. But if so, we can hardly include these taxes in our general distribution of the burden of taxation on the equitable principles above laid down: and, on the whole, it seems best to treat them as a special burden on the propertied classes—inheritances below a certain value being exempted. Such an arrangement has the advantage of conceding something to the equitable claim for a graduated income-tax, without incurring any serious danger of checking accumulation.

## CHAPTER XII

### GOVERNMENTAL ENCROACHMENTS AND COMPENSATION

§ 1. We have now completed the survey, commenced in Chap. III., of the internal operations of government, and the principles on which these operations ought to be conducted. We have adopted the assumption, generally accepted in modern political thought, and realised in modern systems of law, that what the adult members of any state require from their government is mainly security from mutual mischief and interference, including breach of engagements freely contracted;—security which is mainly to be given by maintaining laws that prohibit all such mischief, and inflicting punishment or exacting damages for the violation of such laws. We have, however, seen the need of further governmental interference with industry, and generally with the [illegible]ion of private individuals, on various grounds; sometimes [illegible]rounds that I have called "indirectly individualistic," [illegible]arry out more effectively the principle of protecting [illegible]viduals from mischief caused by others; sometimes, [illegible]ugh rarely, in the interest of the individuals interfered [illegible]th; sometimes, again, to secure for the community—either [illegible]y regulating or by undertaking industrial operations—certain utilities which private competition does not tend to provide satisfactorily; sometimes to enable the poorer members of the community to apply their labour more productively, thus compensating for the encroachment on equality of opportunity which the appropriation of natural agents necessarily involves; sometimes, finally, to save those defeated in

the struggle for existence from the worst consequences of their defeat. The need of some kind of interference under all these heads is generally recognised in the practice of modern communities; but our discussion will have made it evident that very wide divergences are possible as to the proper limits of such interference, even in well-ordered communities of civilised men, of which the governments are aiming in an intelligent and reasonable manner at the well-being of the community.

These divergences are most manifest in the classes of governmental interference distinguished as "indirectly individualistic," "paternal," and "socialistic;" but they would still exist even if the operations of government were strictly confined to the "individualistic minimum." Thus, in trying to define the content of the right of property, from the point of view of the strictest individualism, we have had to recognise a considerable margin of doubt,—for instance, in the important cases of property in land, and property in the results of intellectual labour; and we have noted a similar doubtful margin, in considering the limits of contractual obligation. In the same way many doubtful points of importance occur—as the last chapter has shown—in determining the distribution of the burden of providing government with the resources necessary for the performance of its functions. Considering these actual doubts and disagreements, and taking further into account the continual changes in human relations and circumstances which may be expected to accompany the development of industry and of civilisation generally, we must expect that important changes will occur from time to time in the legislative operations of government even in the most peaceful and well-ordered communities; and that such changes may materially affect the interests of individuals and frustrate expectations founded on the existing law. And even without any general alteration, the most effective attainment of the ends of government in some particular case may require—or appear to require—an encroachment on private rights. But by such encroachments on the legitimate expectations of individuals

governments are obviously in danger of causing pain of disappointment, and more widely diffused evils of insecurity, similar to those that would be caused by the private invasion of legal rights which it is the primary concern of government to prevent. Hence, if it be admitted that such encroachments are inevitable, it becomes important to consider how far their bad effects can be, and ought to be, neutralised or reduced, by compensation to the individuals whom they tend to injure.

A systematic discussion of this question requires us to distinguish carefully the chief ways in which government is liable to encroach on the interests of individuals. I shall first consider cases of encroachment on private property that may occur without any change in the general rules of governmental interference; as when a private owner is compulsorily deprived of some particular portion of wealth, on account of some special governmental need, or of its special fitness for governmental purposes, without any general change in the law relating to this kind of property. I shall then proceed to discuss the effects of those changes in the general rules of governmental action which I have chiefly had in view in the preceding paragraph. These may be divided into three classes. There are (1) changes in laws, including general rules of the executive organ of government, but excluding rules of taxation; (2) changes in taxation, either to obtain an increase of supply, or for more equitable distribution of the burden, or for some economic or technical advantage; (3) changes in some action of government in relation to industry other than legal regulation or taxation. In this third class the chief case is the undertaking by government of certain branches of industry, whether to supply governmental needs—as (*e.g.*) the need of military equipment or apparatus—or to furnish certain commodities to the public generally, as in the case of the Post-Office.

§ 2. I begin with the case of particular encroachment, as that in which the claim to full compensation is most undoubted. It would be obviously unjust that any single individual should suffer loss, merely because the State

happens to want a piece of his land or other property; and the injury to general security that such injustice would cause would far outweigh the pecuniary gain from it to the community.

Indeed it is not clear, on strictly individualistic principles, that any forcible interference ought to be allowed in such cases as this. Why—it may be said—if an individual's property is wanted by the community of which he is a member, should not the price be determined by the "higgling of the market"? I should answer that a Naboth might decline to give up his vineyard at any price: and that, if the general welfare be taken as ultimate end, the public need ought to be regarded as a paramount claim in such a case, overriding an absolute refusal to sell. Such a refusal, however, would be a rare case; ordinarily, the only danger would be that Naboth would try to make the community pay as much as possible for his vineyard. The question, therefore, still remains whether Government should have the right to compel the sale of private property at the price it would fetch, apart from the special public need that occasions the compulsory purchase; or whether the owner should be allowed to charge an increased price for his property corresponding to this new demand for it, as he would in private bargaining.

Now, it would be clearly inexpedient to lay down the general rule that private individuals are never to make extra profit out of the needs of the community. For the hope of such extra profit is the main stimulus to the competition on which the progress of industry depends; hence the adoption of a rule prohibiting it would tend to paralyse the normal action of competition in the businesses that supply the needs of Government; and the general result, in the long run, would be that Government would be worse served at higher charges. But, as we have seen, when a business falls under the condition of monopoly, the good effects of competition tend to be lost. And sudden serious emergencies—such, for instance, as arise in war—may give the holders of particular commodities a temporary monopoly

so effective as to enable them, if unrestrained, to raise their prices exorbitantly against the community, at a time when the financial pressure of Government is likely to be great. Hence it may be expedient in such emergencies that Government should have the power of compulsorily purchasing at a fair price even the products of industry; though such a power should be jealously limited and rarely used, owing to the danger above explained of paralysing competition.

Where, however, what Government needs is land, there is no similar danger in compulsory purchase, since the special convenience of particular portions of land for particular public uses is ordinarily of a kind that cannot be materially increased by human labour or skill. Here, therefore, there seems to be no economic objection to the adoption of the principle that the individual should not be allowed to make a profit out of the special need of the community; the general security of property seems to be sufficiently maintained, if every landowner who is expropriated receives from Government in full what the value of his land would have amounted to, apart from the special need that is the occasion of the expropriation. And in applying this principle we must of course treat the rights of temporary occupiers similarly to those of owners, and include along with the land any buildings or other "immovable" products of labour that may be attached to the land.

But further, if the landowner is not to gain by the special governmental need of his land, neither, on the other hand, ought he to lose by it; hence it will not always be sufficient to give him as compensation the market price of his property: as it may be worth materially more to him than the price it would fetch in the market, either from its connection with the rest of his property or from the nature of the business in which it is employed. Thus, if a shopkeeper is expropriated, compensation is due to him for the "goodwill" or business connection which he would lose by removal to another place. There is, however, a difficulty in applying this principle: for if, for purposes of compensation, we estimate the whole value of a thing to its expropriated

owner, we shall in some cases have to include the purely subjective element of value called "pretium affectionis"—the value derived from attachment and association or peculiar taste; on the other hand, if we include this element, it is difficult to put a limit to the claim for compensation. I conceive that this difficulty can only be dealt with in a rough way, by applying an average outside standard: that is, some compensation should be given for the special subjective value of a thing to its expropriated owner, when it is of a kind likely to have this special value in the case of an average man, and to the extent that would be adequate in such an ordinary case.[1]

Hitherto I have spoken of purchase by government; but the same principles of valuation should obviously be applied in the case of a private company formed to supply a public need, and obtaining on the ground of this public service—either under a general law or by some particular statute[2]—the right of taking land at a fair price.

Other questions arise in settling the details of any such compulsory purchase of land, of which the most important is this: Should the expropriator have the right to take more than is needed for his public object, supposing this additional portion has more value for the expropriator than it had—apart from the public need—for the expropriated owner? It seems clear that, if it is for the public interest that the expropriation should take place at all, it should be as economical as possible consistently with justice to the expropriated: hence, if the expropriator is limited to what is strictly necessary for his public object, at least any certain and undoubted addition of value added by his work to neighbouring land may be fairly claimed by the community as a set-off against the compensation that has to be paid for

[1] It is to be observed that any such allowance of compensation in excess of selling value requires to be very carefully watched, as, owing to the difficulty of exactly estimating it, it involves a special danger that the public may be despoiled by private owners conspiring with officials to sell land (or other things) at an excessive price and share the plunder.

[2] It will be noticed later (chap. xix) that the concession of rights of expropriation to private companies may be treated either as belonging to the legislative or to the executive function.

what is taken. A common example of this is the case of land taken for a road near a town; since the strips on either side of the road tend to be materially increased in their value for building purposes by the change.

So far I have confined my attention to rights of property. But an analogous and equally valid claim of compensation arises in other cases in which an individual's legally secured expectations, having a definite value, are sacrificed to public convenience by the act of government. Thus, if a post in governmental service, which is definitely understood to be held on the tenure of "good behaviour," is abolished on the ground of economy, the holder has a right to be compensated to the full amount of his salary; provided that he on his part is ready to give his services to government to the extent to which he would have been bound to do so in the post abolished. On the other hand, if he is definitely understood to hold his post during pleasure, he has no claim to compensation.

§ 3. I now pass to the more difficult question of changes in general rules of law, which affect detrimentally the interests of individuals.

And first, let us consider changes in respect of property: as being most cognate to the interferences just discussed. Suppose that instead of a particular thing in private ownership being compulsorily taken for a purpose of public utility, we have an abrogation or a new determination of the right of property, in respect of a certain class of things, which destroys or diminishes their utility to their previous owners, with a view to an advance in social wellbeing. There are many historical instances in which legal rights having a definite market value have been completely abrogated in comparatively recent times, the most important being the abolition of slavery in America and of serfdom in Russia, and of manorial rights in other parts of Europe: and the question of compensation has been of great practical importance in all these instances. Approaching this question from the one just discussed, we can hardly doubt that compensation should be given in this case also; since the security

at which law aims is no less intensely, and of course far more extensively violated, if the legally secured interests of a particular class are sacrificed without compensation to the interests of the community, than it would be if an individual's interests were similarly invaded.

And the same reasoning applies not only to the rights of property strictly so called, but to all rights legally secured that have a definite pecuniary value; such as lucrative monopolies, secured to companies or individuals either by express grant of Government, or by custom recognised as having legal validity, and rights to appoint or to be appointed to lucrative posts. There is more doubt as to another class of cases where the change consists merely in some restrictions on the free use or exchange of things, or the exercise of any lucrative or marketable rights, that still remain secured to their previous owners: as when certain modes of treating animals are prohibited as cruel, or the use of the whip by overseers of slave labour before the complete abolition of slavery, or the payment of wages to workmen in commodities furnished at employers' shops, or the sale of advowsons except to certain persons. Any such restriction is likely to cause some economic loss to the person restrained; but such loss will generally be difficult to trace and define: and within limits the members of a progressive community may be supposed to look for minor changes of this kind, and may be fairly required to take the bad with the good;—as they are likely often to receive benefits from new laws for which they are not made to pay. Still, it seems clearly equitable that the compensation for governmental encroachment on the legally secured interests of individuals should extend to cases of restriction on the exercise of rights, as well as to cases of complete abrogation; so far as (1) the rights in question were recognised as normally permanent, and (2) any part of the loss inflicted by the change is clearly and definitely ascertainable and considerable enough to constitute a substantial grievance. And at first sight it would seem that any such loss that is compensated at all should be fully compensated.

There are, however, in many cases important consi-

derations on the other side, tending to the reduction of the amount of compensation. The abrogation of the class of rights which we are considering is assumed to take place because the existence of these rights is opposed to public wellbeing. Now in such cases the degree of mischief that results from the mode of exercising such rights that is most profitable to their possessors may often be very materially reduced if the possessors of the rights will consent to forego a certain amount of profit. Thus, the most crying evils of predial slavery arose from the endeavour to make the utmost gain out of the slaves' labour: and, similarly, the evils attending the venality of ecclesiastical appointments are much reduced if the purchasers of such appointments are restrained by a sense of duty from appointing unfit friends or relatives—though of course this restraint may materially diminish the value of the right purchased.

In any such case, as opinion becomes more and more unfavourable to the general existence of the rights in question, the moral condemnation of the persons who exercise them to the utmost will tend to grow.

Under these circumstances, there seems an obvious advantage in adopting the principle that compensation will only correspond to what the pecuniary value of the rights in question would be if they were exercised in the more moral but less profitable way: for otherwise pecuniary interest would prompt selfish owners of the right, during the period in which public opinion is growing in the direction of the change, to exercise their rights to the utmost, in spite of the mischief, in order to establish a claim to larger compensation. Any such conflict between self-interest and current morality is clearly detrimental to the wellbeing of the society.

Sometimes, however, no important line can be drawn between a harmful and comparatively harmless use of the rights in question: any use may be so decidedly mischievous as to be altogether condemned by the growing body of opinion which will ultimately sweep away the institution.

In this case all the persons interfered with by the change will be in the position of having made money by practices which, though not strictly illegal, are yet condemned by a widespread—and ultimately prevalent—moral opinion, as opposed to the general welfare. The slave-trade was in this position a century ago; and up to a comparatively recent date the keeping of public gaming-houses, in several European States.

In such cases, when the moral condemnation is so widespread as to be practically universal, the most that can be required in the way of compensation is mitigation of any severe hardship that a sudden change in the law might sometimes cause. The resulting insecurity is even advantageous to society, so far as it diminishes the inducement to lucrative practices that are recognised as socially mischievous, though not legally prohibited. It may be urged that there is a counterbalancing mischief in the more widespread though less intense insecurity that would be felt by persons engaged in industry, if any industrial class were liable to suffer an uncompensated loss of their legal rights, merely because a majority of their fellow-citizens had suddenly become convinced that these rights were opposed to the public welfare. I admit some force in this argument; but I cannot think that the danger it signalises is very material, in the case of such a change in moral opinion as I have above supposed. Such a change, if we may judge the future from the past, is likely to be of slow growth: so that any class affected by it will have a long period of warning before the moral change has its legal consequences.[1]

The reason above given for not allowing full compensation for the gainful exercise of legal rights in a manner opposed to the interests of society, when such rights are altogether abrogated, applies still more strongly where such rights are only restricted, so as to cut off the mischievous

[1] In the present discussion I do not assume any particular structure of Government; but it may be observed that under a settled popular Government the necessity of prolonged agitation to bring about a serious change in established legal rights will generally involve a long date of notice to the persons whose rights will be invaded by the change.

part of their exercise, without interfering with the part that is socially advantageous. In this latter case, if the line between mischievous and salutary use can be drawn with clearness, I conceive that there will be no occasion for compensation, except when a sudden change would inflict great hardship on individuals.

§ 4. Let us now pass to consider changes in taxation. Here the fundamental question is whether the design of the change is to get rid of the technical defects or indirect economic disadvantages of certain established taxes, or to alter the distribution of the burden of taxation in order to make it more equitable. In the former case equity requires the legislator to aim at compensating for any extra burden which the improvement in question will impose on particular classes by lightening in some other way the contributions of these classes to the public needs; but the discussion in the last chapter will have shown that we cannot practically hope to attain more than a rough approximation to equity in the allotment of the burden of taxation. In the latter case there is *primâ facie* no ground for compensation, since it is obvious that if changes in taxation are designedly of a *distributional* kind,—if the aim in making them is to carry out more exactly the principle of proportional equality in taxation, however this principle may be defined, —their aim would be defeated by giving full compensation to the persons who were losers by the change. It is true that such a change may inequitably affect individuals who may have recently become members of the class whose burden is increased by the change, and who may therefore have to bear the new burden without having received any of the expected advantages: hence, to avoid hardship, it is important that such changes should not be violent or sudden.

So again, distributional changes of the kind advocated in Chap. IX., with a view to equalisation of opportunities, do not ordinarily give occasion for compensation. It must be admitted that the increase of competition for the better paid positions in trade and industry, resulting from the

extension of educational advantages to the poor, is likely to cause some diminution in the earnings of the rich, besides what is taken in the way of taxes to defray the cost of this extension; but this loss would usually be of so indefinite a kind as to put any claim for compensation out of the question, even if it were otherwise admissible.

This leads me to consider finally the third of the species of encroachment by Government on the interests of individuals which I originally distinguished: viz. that which occurs when Government undertakes industries in competition with the industries of private individuals; or gives special facilities and encouragement for the undertaking of such industries.

Here, I conceive, the only admissible claim to compensation must be rested on the *degree* of loss inflicted by such competition, rather than on the mere fact that loss is suffered: since such loss is in *kind* similar to that which, under the conditions of open competition, is continually inflicted on private individuals or companies by the success of rivals. Suppose, for instance, that a railway was made for which the land required was obtained by free purchase from the owners, without governmental interference: it is obvious that no one would think of expecting the railway company to compensate for the loss inflicted on a stage-coach company. And if so, it does not seem that the mere fact of the land requiring to be compulsorily taken can give the stage-coach company any additional claim for compensation: and if not, there seems no reason why such a claim could be validly urged if the railway were made at the public expense. But, owing to the magnitude of the resources at the disposal of a government, it is no doubt a peculiarly formidable industrial rival; care should therefore be taken that it does not use its giant's strength as a giant, so as to inflict on private industries loss much more severe and sudden than they would be exposed to in ordinary industrial competition. Where action causing such sudden and severe loss cannot be deferred, it is reasonable that some compensation should be given to the persons damnified.

A case which seems to deserve special consideration occurs where commercial advantages have been *practically* conferred on private traders by the action of Government, without being *legally* secured to the persons who enjoy the advantages. The value of the goodwill of public-houses in England under the present system of licenses is largely derived from this source; and in discussing the compensation due to the owner of any such public-house, we have to distinguish between the extra element of value given by the limitation of competition that results from the licensing system and what would have been the value of the business if no such limitation had existed. Of course an exact separation between the two elements is practically impossible; but theoretically they stand in quite different relations to a claim for compensation. For the latter element I consider that compensation is clearly due on the principle, and with the qualification, explained in the preceding section: since the view that alcohol-selling is to be treated as altogether mischievous—like slave-trading—appears to me fanatical. But I can see no legitimacy in a claim to be compensated for the additional element of value due to the governmental limitation of competition, if no guarantee of the permanence of this limitation was given by Government when the system was instituted.

## CHAPTER XIII

### LAW AND MORALITY

§ 1. In an earlier chapter I incidentally noticed the distinction between Ideal Morality or the true moral code—by many conceived and spoken of as the "Law of God"—and Positive Morality, or the rules of duty supported by the sanctions of public opinion in any given age and country. It does not fall within the plan of this treatise to discuss the principles of the true moral code,—except so far as this relates to the conduct of Governments, or of private persons in their relations to Government. But the moral opinions and sentiments prevalent in any community form so important a consideration in practically determining how its government ought to act, that it is desirable to survey briefly the general relations of Positive Morality to Positive Law in a modern State.

I must begin by making more complete the general conception of "legal" in contrast to "moral" rules which was introduced in Chapter II. I there, following Bentham and Austin, regarded as "legal" those rules of which the violation is repressed, directly or indirectly, by the action of Government or its subordinates; whereas the violation of a rule of positive morality is only punished by general disapprobation and its social consequences. This definition corresponds approximately to the usage of the term "law" in a well-ordered society, and lays stress on a characteristic of fundamental importance. But this difference in the sanctions attached to legal and moral rules respectively is not the

only general and important distinction that a comparison of the two systems of rules shows; there is a difference of another kind in the comparative definiteness and systematic coherence of the two codes, to which I wish now to draw attention.[1] I have first to observe that the definition of a law as a rule actually enforced by governmental penalties is not quite exact; since judges and magistrates are liable to err, and when they err, it would be correct to say that they have "mistaken the law," and applied a rule that is not really a part of the law of the land. In England, indeed, a decision of the highest Court of Appeal can hardly be held to be inconsistent with law, since, by a professional custom that has now the force of law, all other judges are bound to decide subsequent cases in accordance with it; if, therefore, it is inconsistent with law as it has been, the Court must be held to have practically made new law in pronouncing it. But in countries other than England and her dependencies and the United States, judges are not so definitely bound to decide according to precedents; so that the decision of one judge may be contradicted by the decision of another in a similar case, and then it will manifestly follow that one of the two decisions was not in accordance with law. In any case, the power of making what is really new law that is placed in the hands of a judge in a modern civilised community, is placed there not because he is selected or qualified for the purpose of exercising it, but because he is selected and qualified for the purpose of keeping it as much as possible unexercised. His primary duty is to apply the law as it is, not to make it what he thinks it ought to be; and the more conscientiously and skilfully he fulfils his primary duty, the more will his power of determining law be limited to cases that are really unprovided for or ambi-

[1] The comparison thus drawn between Positive Law and Positive Morality is of some importance, as we shall see, in respect of the practical relations between the two which it is the object of this chapter to discuss. But I have developed it at more length than I should otherwise have done in view of a subsequent discussion of International Law and Morality in chap. xvii., for which the comparison here made appears to me an indispensable preliminary.

guously provided for in the law as already determined, and the more, even within these limits, will his new legislative decisions be in harmony with the principles of this pre-existing law.

How then is the "law as it is" to be ascertained by the judge? What precisely is the intellectual process by which a right judicial decision may be reached? The answers to these questions are somewhat different in different countries and at different times. In such a community as we have throughout contemplated, I have assumed the existence of some established organ of legislation, some body or combination of bodies, whose general commands relative to the social conduct of members of the community will be unquestioningly applied by judges and, generally speaking, obeyed by the bulk of private members of the community; but it does not follow that the rules which it is the practice of Courts to apply have been all derived from this source. In some countries, no doubt, they have been so derived in the main; codes have been framed intended to cover the whole or chief part of the field with which judicial decisions have to deal. So far as this is the case the judge's function is merely to interpret the code; if it is clear and complete, the process is easy and straightforward: but if any of the terms used in it are vague, he has to give them a precise meaning; if they are distinctly ambiguous in ordinary use, he has to infer from the rest of the code which meanings are intended; if two rules in the same code are apparently inconsistent, he has to find out some means of reconciling them, or to decide which is to give way to the other. It will easily be understood that this function requires care and subtlety and trained skill, even in the simplest case of a code recently framed: but it becomes more complex and usually more difficult when some time has elapsed, in which the code has been importantly modified by fresh legislation; since this not only increases the aggregate of rules that have to be interpreted, but also still more the danger of inconsistency in them, from the new matter introduced at different times by legislatures differently composed.

And the complexity is greater still in such a case as our own, where a great part of the law has had an origin independent of the action of the Legislature; being composed partly of old customary rules gradually made more definite by judicial interpretation, partly of rules introduced by judges at an earlier stage of our history, from Roman law or other foreign sources, or from their own moral consciousness. In this case Law presents itself as a system of rules, heterogeneous both in their intellectual origin, and in the source of their obligation regarded from the judges' point of view—some are binding because the Legislature has laid them down, others because previous judges have agreed in accepting them. But, whatever their origin, there are two conditions to which in their application as law they are universally subject: they must be interpreted so as to be mutually consistent, and cogent reasons for a decision in every case that presents itself must, if possible, be somehow extracted from them. It is in the fulfilment of these conditions that judicial skill is shown, and it is in the endeavour to fulfil them under difficulties that the process of judicial law-making goes on in England; for if two rules as previously defined are found to collide, or if there are two competing analogies equally applicable to a case that is not clearly included under any pre-existing rule, the judge is forced to give a fresh determination to the law that it is his aim merely to interpret. Sometimes, in such innovations the judge is doubtless influenced by considerations of abstract equity or utility, but only within the strict limits above explained; since, where the decision clearly most in harmony with the analogies of established law is plainly inexpedient, it would now be generally recognised as a case for the intervention of the Legislature. Thus, in one way or another, either by the authority of the judge or by that of the Legislature, divisions of opinion as to the right application of received legal rules —and also any marked divergences between such rules and what is generally regarded as expedient—tend to be continually removed, either by the authority of the judge or by the Legislature. And as the development of Law goes on,

the function of the judge is confined within ever-narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the Legislature.

§ 2. I have examined with some minuteness the process of development of law in a modern community, because it is due to the special characteristics of this process that the differences in such a community between Law and Positive Morality, when compared merely as intelligible systems of rules without regard to the motive for obeying them, are as striking and instructive as the differences in the sanctions attached to the two systems. We can see how Law must inevitably be greatly superior to Positive Morality in definiteness and consistency; since in the case of moral rules there is no judicial process by which doubts as to what the accepted rule *is* on any question can be authoritatively settled, and no legislative process by which any divergence from what, in the opinion of thoughtful persons, *ought* to be established morality, can be at once and decisively removed.

And it may be observed that the differences between the two systems of rules, both in respect of sanction and in respect of systematic intelligibility, have tended to become more marked as modern civilisation has developed. In earlier stages of European civilisation, there has often been law in real operation, in the sense of a complicated system of precise rules applied to the guidance of men's conduct by experts whose authority is generally accepted, with little or no governmental force sustaining the acceptance of the rules.[1] Under these circumstances, Law approaches to Positive Morality in respect of its sanction; and, on the other side, in periods when casuistry has really flourished,—as in the period of the later Middle Ages,—Positive Morality has

[1] For instance, Maine, in his account of the ancient Irish Law developed by the Brehons (*Early History of Institutions*, chap. ii.), says that "the process of the Irish Courts, even if it was compulsory, was at the utmost extremely weak;" and "that it is at least a tenable view that the institutions which stood in the place of Courts of Justice only exercised jurisdiction through the voluntary submission of intending litigants." Similarly—as I learn from Mr. Bryce—in Iceland in the latter part of the tenth and the eleventh centuries the so-called Courts of Law had no coercive force at all.

shown an approximation to Law in the elaborateness and precision of its rules. From the fourteenth century onward, the acumen and industry of ecclesiastical writers were largely occupied in working out in a quasi-legal manner a body of rules, to be applied in the confessional to the practical guidance of ordinary private members of the medieval community: while, before the Reformation, there was no disposition, at once strong, widespread, and unconcealed, to dispute the claim of these writers to authority in the matters with which they dealt.

If we ask why this quasi-legal treatment of morality fell into the disrepute in which it now lies, there is a twofold answer to be given,—apart from the general indignation caused by Jesuitry, the effect of which taken alone would doubtless only have been transient. Partly the belief came to be widely held that in matters of morality, speaking broadly, any one honest man is as much an expert as any other, and that it is his duty to exercise his own judgment and follow the light of his own conscience. Partly—so far as some further enlightenment of a plain man's conscience was felt to be a desideratum—experience was thought to have shown the danger of trying to obtain this enlightenment from the industry and ingenuity of systematic moralists, exercised in formulating precisely the generally accepted rules: since the quasi-legal process of scrutinising closely the cases of difficulty and apparent conflict among such rules, in order to draw the lines of duty clear, must tend to bring into demoralising prominence the uncertainty and disagreement among experts on moral questions: while the lack of an authority to decide controversies rendered it impossible to reduce the element of doubt and discussion in the manner in which it is continually reduced in the development of law. And thus, as I have said, the moral code of a modern country has come to be necessarily inferior as an intelligible system to its law, because in the case of the former every man is encouraged to think himself a judge, there is no final court of appeal, and no one can admit any external legislation.

The consequence of this is, not only that we find, in the

generally accepted moral code of a modern society, an amount of conflict, vagueness, and uncertainty, that could not for a moment be tolerated in modern law: but also that, when we examine closely the aggregate of opinions and sentiments, the expression of which constitutes the effective sanction of positive morality, we find, along with the generally accepted code, a number of special codes, more or less divergent from it on important points. What is called the code of honour —the rules of behaviour maintained by the *consensus* of gentlemen in modern Europe—is a well-known instance of this: but the same phenomenon is exhibited in some degree by various other divisions of society, based upon different grounds—by religious sects and parties, and the members of different trades and professions. And thus sometimes, owing to the prevalence of particular religious sects or industrial classes, or perhaps only of particular schools of thought or drifts of opinion, in different localities, we find important local variations in the popular judgment as to what is mischievous or the reverse in conduct.

§ 3. Let us now proceed to consider the practical relations between the two systems of rules that we have been comparing. Firstly, it is obviously of fundamental importance to Government that the rules it lays down and enforces should come as little as possible into conflict with positive morality. If Government invades popularly recognised rights, or maintains rights popularly regarded as wrongs; if it compels a man by legal penalties to do what he is commonly thought right in refusing to do, or to abstain from doing what is commonly thought innocent or even laudable, the conflict is dangerous in two ways: it renders it difficult to enforce the law in the particular case without an unusual exercise of force and consequent intense and diffused annoyance, and it has a serious tendency to weaken the habit of obedience to law and government in the citizens generally. Hence, when any new governmental interference of a coercive kind is required to repress practices dangerous to social well-being, or otherwise to attain some important public end, it is expedient, if possible, that it should only take place after

public attention has been strongly called to the need which the new regulations are designed to meet.[1]

Further, owing to the divergences that we have noted in Positive Morality, it is always possible that even legislative measures that have the approval of the majority may come into conflict with the moral beliefs and sentiments of important portions of the community: and the prospect of this may be a decisive reason for deferring or modifying governmental interference that would be otherwise expedient. Even if the legislation in question is not exactly disapproved as immoral, it must always be a serious drawback to its expediency that it will have to contend with strong forces of desire, interest, and habit, without receiving effective support from Positive Morality.

Thus the actual condition of the positive morality of the community—including under the term all opinions as to the bad and good effects of actions—confines within rather narrow limits the power of an enlightened Government to act upon the community governed in conformity to the conclusions of the highest political wisdom of the time. On the other hand, it is no less important to note that the legislator has within limits a valuable power of modifying positive morality. Through the general habit of law-observance and the general recognition of the duty of obeying rules laid down by a legitimate authority—which we may expect to find in any well-ordered community—the legislator may first obtain a general obedience to rules to which current morality is indifferent or even mildly averse; and then by the reaction of habitual conduct on opinion, a moral aversion to the opposite conduct may gradually grow up. In other cases, where Government interferes to prevent mischievous acts which are already regarded with some degree of moral disapprobation, though feeble and ineffective, the legislator or judge may produce a more sudden and impressive effect by giving sharpness and decision to this

[1] In a state under popular government, it is of course impossible that any decided conflict between law and the moral opinion of a majority of the electorate should be more than very temporary.

disapprobation. Especially we may say that the judicial organ of government is within certain limits accepted as a moral expert; if within these limits it classifies an act with crimes, the world is prepared so to regard it.

§ 4. But Positive Morality, in a well-ordered State, does not only support the action of Government: it has—as I said at the outset—the further important function of regulating conduct in matters beyond the range of governmental coercion. To consider in detail how this function ought to be performed would be to write a treatise on ethics: but we may briefly note certain parts of social conduct when for special reasons the influence of moral opinion is indispensable or preferable, as a means of producing the kind of effects at which Law aims. In this survey it is convenient to distinguish between the *penalties* of Positive Morality and its *rewards*—moral censure and moral approval or praise. It is to the operation of moral censure that our attention is naturally directed in studying the analogy between Law and Morality, and I shall accordingly begin by considering it: but, as we shall presently see, the respective functions of censure and praise cannot be sharply separated.

Firstly, then, moral censure is the chief resource that remains available, when the means which the legislator employs fail to attain the end which he has in view, from accidental circumstances defeating their normal operation. For instance, we have seen that the legal validity of contracts is subjected to certain conditions, imposed to prevent coercion and deception, and to secure due deliberation on the part of the contractors: but granting that these conditions may be rightly imposed as generally suitable to the end in view, still particular cases may occur in which an engagement was clearly made with full deliberation and without any improper inducements being applied, although the legal conditions have not been fulfilled. In such cases it is generally desirable that the violation of the engagement should be censured, though reparation cannot be legally exacted. So again, a testator may accidentally fail to make a valid will, though his intention may be expressed with sufficient clear-

ness to make it the duty of his heir to conform to it if it is not in its nature improper: here, too, the moral opinion of persons acquainted with the circumstances may usefully take the place of the legal coercion that cannot be applied.

Secondly, there are cases in which the intervention of law is inapplicable as a remedy for undoubted mischief, owing to the general importance of leaving wide discretion to the private individuals who would have to be coerced. One chief case of this class is the treatment of children by parents: in order to maintain the parents' sense of responsibility on the one hand, and the child's habit of obedience and respect on the other, it does not seem expedient that Government should interfere with the domestic rule of the parent, unless there is evidence of gross neglect or cruelty; but there may easily be breaches of parental duty falling short of this, which may properly be visited with moral censure.

So again, we have before[1] seen that it is impossible to define the spheres of individual freedom for adults so that the observance of the limits may completely prevent all serious mutual annoyance; and, in particular, we have noted that the power which an individualistic system must necessarily secure to sane adults generally, of freely entering into and terminating economic relations with other individuals, may be used to injure and coerce those others. In such cases public opinion may importantly supplement law in repressing malevolent or intimidative exercise of legal freedom, and reducing mutual annoyance to a minimum; though it must be observed that this very public opinion is itself a coercive force which, if misdirected, may do harm of this kind in the worst degree.

Again, there must always be cases, especially in the department of contract, in which the enforcement of strict legal rights would — owing to exceptional circumstances which a legislator or judge cannot safely take into account —be manifestly harsh in its effects, and would show a repulsive want of normal human sympathy.

Again, there are acts so highly detrimental to social well-

[1] See chap. iv. § 4.

being that it is desirable to supply a strong inducement to abstain from them, which are yet unsuitable objects of legal repression; because the temptations to do them being strong and concealment easy, it is impossible to prevent them altogether, while at the same time if they are driven to seek the greatest possible secrecy their mischief is liable to take a much more aggravated form. The leading case of this kind is intercourse of the sexes outside the conjugal relation: it has always been recognised that it is the special function of Positive Morality to keep this within the narrowest possible bounds, by affixing a strong stigma of discredit to such intercourse: but it has also almost universally been held that it would be unwise to make it legally punishable.

Finally, there is much mischief similar in kind to that which law aims at repressing, which it is expedient to leave to morality to deal with, merely because it is not sufficiently important in degree: such as insults and calumnies of minor gravity, deceptions and misrepresentations which have not caused any considerable amount of definite damage, though to leave them uncensured would tend to impair the pleasure and profit of social intercourse.

Let us turn to consider the matters in which the operation of morality by praise rather than censure is of special political importance. The chief case under this head is the expenditure of wealth for public ends, or for the mitigation of the most painful inequalities resulting from the present individualistic distribution of wealth. Expenditure of this kind, unless it shows marked unwisdom in the adaptation of means to ends, is almost universally praised; but abstinence from such expenditure is not commonly blamed in any particular case. Some censure, no doubt, is incurred by a rich man who spends his whole income in luxuries for himself and his family and in exchanging luxurious hospitalities with other rich men. But though he is censured in a broad way for this course of life, the censure is vague and general, and does not attach itself to abstinence from any particular act of philanthropy. It is—rightly, as I think—held that the struggle to get rich is socially useful,

so far as it impels the struggler to render services to society deserving of high remuneration; and that any such restrictions on a rich man's freedom of expenditure, as would amount to graduated taxation enforced by moral censure, must tend to impair the stimulus to this useful effort. Still, undoubtedly, a powerful pressure—though rather in the form of praise than of censure—is exercised by public opinion on rich men in the direction of eleemosynary and public-spirited expenditure, and is powerfully aided by all earnest teachers of the prevalent forms of religion; and under the influence of this pressure the amount of wealth and labour voluntarily devoted to the relief of distress, and to the promotion of objects of public utility, is in any modern community so considerable, that it becomes an important factor in the practical determination of the scope of governmental interference for similar purposes. Thus, for instance, political thinkers and statesmen, in advocating the English method of dealing with pauperism, have usually assumed not only that public poor-relief will be supplemented by private almsgiving, but that a fundamentally important part of the work may be left to the latter. As we saw, the distinctive principle of the English system is that Government is not to discriminate between the deserving and the undeserving poor, but to secure to all who are destitute a minimum of subsistence under conditions deterrent but not painful; and this principle would be rejected as too harsh by many who now accept it, were it not for the assumption that private almsgivers will be ready to undertake the task of discrimination which Government declines, and to accord more generous and tender treatment to those who have fallen into distress through undeserved calamities.

Similarly, as regards the building and maintenance of hospitals and asylums for persons physically and mentally afflicted, the provision for education in all grades, the promotion of culture by means of museums and libraries, the endowment of scientific research, and other ends of recognised public utility;—the question what Government

should do cannot be answered unless we know what the liberality of private individuals may be expected to accomplish if Government does not interfere.

§ 5. Since, then, the force of opinion and sentiment in the community as to the social duties of individuals is so valuable to the government, both as support and as supplement, and so dangerous in antagonism, it remains to inquire how far it is a proper function of government to take measures to stimulate and regulate this force.

The question, however, does not practically present itself in this simple form in the political societies of Europe and America; since in these societies the systematic teaching of morality to adults—and, to a great extent, the moral education of the young—are, by a firmly established custom, left in the hands of one or more of the different Christian churches: so that the problem of governmental interference for the moralisation of the citizens takes the form of a "question of the relations of Church and State." Still, it seems desirable, in such a treatise as the present, to begin by considering the problem in a more general way.

Let us suppose, then, that we are dealing with a civilised community in which there is either no religion having general acceptance or important influence, or else only religions that have no important connection with morality: I mean religions in which the objects of worship are conceived to be propitiated otherwise than by the performance of social duty: and let us ask whether government, under these circumstances, should undertake the business of teaching morality and stimulating moral sentiments. The answer to this question would seem to me to depend partly on the answer given to one of the most fundamental questions of moral philosophy: viz. whether the performance of social duty can be shown scientifically—with as strong a "consensus of experts" as we find in established sciences generally—to be certainly or most probably the means best adapted to the attainment of the private happiness of the agent.

I. If we answer this question in the affirmative, it does

not indeed follow that morality ought to be based on self-interest alone; it may still be thought objectionable to rely on enlightened self-regard as the normal motive for conformity to moral rules. Still it would be an important gain to social wellbeing to correct the erroneous and short-sighted views of self-interest, representing it as divergent from duty, which certainly appear to be widely prevalent in the most advanced societies, at least among irreligious persons. Hence there are at any rate strong reasons for regarding it as the duty of government, in the case supposed, to aim at removing this widespread ignorance and error by providing teachers of morality: and such a provision might be fairly regarded as indirectly individualistic in its aim, since to diffuse the conviction that it is every one's interest to do what is right would obviously be a valuable protection against mutual wrong. It is not, however, quite clear that, even assuming the harmony between duty and self-interest to be scientifically demonstrable, it would be expedient to have morality taught—to adults at least—by salaried servants of government. For firstly, such teaching would only be efficacious if the teachers inspired confidence: and the analogy of the medical profession suggests that confidence, in the degree required, would be more readily given to moralists freely chosen by those whom they advised. Further, in any cases of doubt or dispute, in which it might seem to be the interest of governing persons that the governed should act in the manner recommended by the moralists, the latter would be liable to the suspicion that they were biassed by the prospect of advancement or fear of dismissal: so that they would give but a feeble support to Government—just, perhaps, when their support was most needed. On the other hand, if this danger were partially met by securing the teachers from dismissal, the service would be liable to be encumbered with unfit persons.

II. But the objections against governmental provision of professional moralisers become much stronger, if we regard it as impossible to prove by ordinary mundane considerations that it is always the individual's interest in the present con-

dition of human society to do his duty; or if, granting the evident coincidence of self-interest and duty, it is still held that self-regard should not be the normal motive to moral action. For in either of these cases the teaching required should be such as will produce a powerful effect on the emotions of the taught, no less than on their intellects; we should, therefore, generally speaking, need teachers who themselves felt, and were believed to feel, sincerely and intensely, the moral and social emotions that it was their business to stimulate; and governmental appointment and payment would hardly seem to be an appropriate method of securing instructors of this type. If a spirit of devotion to a particular society or to humanity at large, and readiness to sacrifice self-interest to duty, are to be persuasively inculcated on adults, the task, I must think, should be undertaken by persons who set an example of self-devotion and self-sacrifice; and it should therefore be undertaken gratuitously by volunteers, and not by paid officers. The case would be somewhat different with the more malleable natures of children: it would still be clearly expedient that schoolmasters as well as parents should seriously endeavour to promote the growth of moral habits and sentiments in the youthful minds committed to their charge. But I should think it very doubtful how far, in the circumstances supposed, this growth would be most effectively promoted by formal instruction; and not rather partly by steady enforcement of received rules, with such incidental explanations of their *rationale* as can be effectively given, as polite manners are now promoted; and partly by stimulating social sentiments through a well-selected study of literature and history, as patriotism and public spirit are now mainly promoted.

Let us now turn from the purely hypothetical problem that we have been discussing, to consider the form which the question of governmental interference to promote morality actually takes in modern European communities. For ordinary members of such communities, the connection of any individual's interest with his duty is established by

the traditional Christian teaching as to the moral government of the world, and the survival of the individual after his corporeal death. Accordingly, this traditional teaching —though it by no means relies solely on appeals to self-interest—still always includes in its store of arguments appeals of this kind, having irresistible cogency for all hearers who believe the fundamental Christian doctrines. So far as the rules of duty thus taught are those commonly accepted by thoughtful persons, the value of the aid given to the work of government by this supply of extra-mundane motives to the performance of social duty can hardly be doubted. But the expediency of governmental action to secure this aid is importantly affected by the fact that the teachers who give it are actually organised in independent associations called churches, whose lines of division differ from—and to an important extent cut across—the lines of division of political societies; and which for the most part would resist strongly any attempt to bring them directly and completely under the control of the secular government. The practical question therefore is, whether government should leave these churches unfettered—treating them like any other voluntary associations based on free contract—or should endeavour to obtain a partial control over them in return for endowments or other advantages. I do not propose in this treatise to enter upon the historical or the theological aspects of this controverted question: but it is easy to show that the settlement of it is likely to be at once difficult and of great importance to political well-being. For, so far as the priest or religious teacher seeks not merely to provide a harmonious and satisfying expression for religious emotion, but also to regulate the behaviour of man to his fellows in domestic and civil relations,—using as motives the hope of reward and fear of punishment from an invisible source—his function obviously tends to become *quasi-governmental;* accordingly, where religious belief is strong, the power given to the priesthood by its control of these extra-mundane motives renders it not only a valuable auxiliary to the ordinary or secular government

in the business of maintaining the general performance of civic duty, but also a most formidable rival, in case of any conflict between the priesthood and the organs of secular government. A similar rivalry and conflict is of course possible between a non-religious association among the members of any political community and the government of that community: and history affords some striking examples of such rivalry, though none comparable in extent and importance to conflict for power between "Church and State" in Western Europe. I have accordingly thought it best to consider the question of governmental intervention in religious matters in a special chapter on the Relation of the State to Voluntary Associations,[1] which will be more appropriately introduced after we have examined the organisation of secular government.

[1] Chap. xxviii.

# CHAPTER XIV

## THE AREA OF GOVERNMENT—STATES AND DISTRICTS

§ 1. In the preceding chapters—with the partial exception of Chapter xi.—I have discussed the functions of Government, without regard to the limitations of its area. I have spoken from time to time of "the community" whose members habitually obey the government, and in whose interests government is assumed to exercise its functions; but I have not recognised any definite limits to the community: so far as the main discussion has gone, the community might be coextensive with the human race. The time has now come to direct attention to the limits of the area of government. As actually existing, they are of two kinds: (1) each independent political society comprises only a portion of civilised humanity, so that a fundamentally important department of the work of its government consists in the management of its relations to societies and individuals lying beyond its pale: and (2) in every independent political society the functions of government are to an important extent exercised by individuals or bodies whose powers extend over a narrower area than the whole society—"local governments," as they are called. Accordingly, I propose in the present chapter to consider briefly how these two kinds of limits—the boundaries of external separation, and the boundaries of internal subdivision—are or ought to be determined.

When, however, we raise the question of what ought to be, in regard to external boundaries, we at once bring into view

two different stages of divergence between accepted political ideals and actual political facts. For our highest political ideal admits of no boundaries that would bar the prevention of high-handed injustice throughout the range of human society: and from the point of view of this highest ideal it might be fairly urged that we ought no more to recognise wars among nations as normal than we recognise wager of battle as a remedy for private wrongs: and that if so, we ought not to recognise as normal the existence of a number of completely independent political communities, living in close juxtaposition; since we must expect that grave and irreconcilable disputes among such communities will be settled, as they always have been settled, by wars. I agree that the only trustworthy method of avoiding wars among states —as among individuals—would be the establishment of a common government able to bring overwhelming force to overbear the resistance of any recalcitrant state. And I am myself inclined to think that a federation of West-European[1] States at least, with a common government sufficiently strong to prevent fighting among these states, is not beyond the limits of sober conjecture as to the probable future course of political development. From the earliest dawn of history in Europe, down to the present day, the tendency to form continually larger political societies—apart from the effects of mere conquest—seems to accompany the growth of civilisation. The traditions of Rome and Athens make it clear that these famous city-states were formed by the cohesion of parts that had previously regarded each other as foreigners and occasional enemies: and a similar tendency to combine in continually larger aggregates is seen in the early history of the Teutonic tribes. We see the same phenomenon in the formation of the Leagues that are prominent in the later period of the independence of Hellas: we can discern it—though in a less simple form —in the growth of European nations up to the commencement of modern history: as exhibited in the union of Italy

[1] I leave Russia out of account, as being at a decidedly less advanced stage of social and political development than the West-European States.

and of Germany it is the most striking feature of recent European history; and North America shows us an impressive example of a political society maintaining internal peace over a region larger than Western Europe.[1] Usually no doubt this aggregation of civilised mankind into larger unions, so far as it has been voluntary, has been mainly due to the pressure of external dangers from enemies common to the smaller uniting bodies; and there are no present signs that foreign perils, sufficiently formidable to produce this effect, are likely to threaten the group of West-European nations. But if the boundaries of existing civilised states undergo no material change, the relative strength of the United States, as compared with the West-European States, will before the end of the next century so decidedly preponderate, that the most powerful of the latter will keenly feel its inferiority in any conflict with the former. And even apart from this motive to union, it seems not impossible that the economic burdens entailed by war, the preponderantly industrial character of modern political societies, the increasing facilities and habits of communication among Europeans and the consequently intensified consciousness of their common civilisation, may, before many generations have passed, bring about an extensive federation of civilised states strong enough to put down wars among its members. But, in any case, this ideal is at present beyond the range of practical politics. There is not at present, and there is no immediate prospect developing, any consciousness of common nationality among Europeans or West-Europeans as such: and the practically dominant political ideal of the present age does not include an extension of government beyond the limits of the nation. As in Greek history the practically dominant ideal

[1] I do not overlook the centrifugal forces that have also been at work throughout European history: especially, in recent times, those due to the claims of nationalities, and the tendency of colonies when full grown to separate from the mother-country. Still it does not seem rash to forecast as probable, on the basis of our knowledge of past history, that the forces tending to the formation of continually larger political unions will on the whole prevail.

is a society of independent City-states, so, in the period to which we belong, it is a society of Nation-states.

§ 2. To get a clearer view of this ideal, let us examine more closely the conceptions of "State" and "Nation" as currently used.

I must begin by distinguishing between (1) the narrower use of the word "State" to denote the community considered exclusively in its corporate capacity, as the subject of public as distinct from private rights and obligations; and (2) its wider use to denote the community however considered. In previous chapters we have been led to conceive the community as capable of holding property and incurring debts in its corporate capacity: and, in speaking of these as the property and debts "of the State," we intend to distinguish them from the aggregate of the properties and the debts of the members of the community. This distinction, we may observe, is recognised by foreigners as well as natives. Thus, if England were to go bankrupt no individual Englishman would be held liable for any part of the large sums that his State owes to foreigners; and, according to the usage of war, an invader of England would freely take the public property of the English State, but he would not seize the property of individual Englishmen beyond exacting certain limited "contributions." A similar distinction is implied when we speak of philanthropic duties as incumbent on "society" but not on "the State." At other times, however, we apply the term rather to the "body politic" considered as an aggregate of individuals: thus we might speak of England as a rich State, having in view the wealth possessed by the aggregate of Englishmen. It would be inconvenient to be obliged to avoid either use of the term; but I shall try to prevent the ambiguity from causing any confusion.

In the present chapter I shall take the wider signification, I shall mean by a State what I have also called a Political Society; *i.e.* a body of human beings, deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government, which represents the

society in its collective capacity, and ought to aim in all its actions at the promotion of their common interests. And I shall assume this government to be independent, in the sense that it is not in habitual obedience to any foreign individual or body or to the government of a larger whole.[1] It would, however, be contrary to usage to apply the term "State" to all human societies living under independent governments —including (*e.g.*) nomad tribes:—it must be added therefore that the term implies a certain degree of civilised order. The exact degree of civilisation implied, according to usage, is hardly clear: but we may lay down (1) that in a community that is called a State there is understood to be an effective consciousness of the distinction before explained, between the rights and obligations of the community in its corporate capacity and the rights and obligations of the individuals composing it; and (2) that the community so designated is understood to be in settled occupation of a certain territory. It seems essential to the modern conception of a State that its government should exercise supreme dominion over a particular portion of the earth's surface: and if we once admit that the range of governmental control is to be limited, the advantage of determining its limits by territorial boundaries is obvious: since the government's task of protecting its subjects from wrong would manifestly become tenfold more difficult if they were liable to be brought into contact, to an indefinite extent, with persons who might legitimately refuse obedience to their government. Accordingly, in modern times, it is generally recognised as a fundamental right of a civilised state that its government should have unquestioned power of determining and enforcing law within the limits of the territory that is recognised as belonging to it. It is only in the case of weak and imperfectly ordered communities that serious limitations of this

[1] It is to be observed that the assumption of complete independence is not always implied in the current usage of the term "State." Thus, the several members of the North American Union are called States, though not independent in their external relations, and not even completely independent in their internal legislation and administration. But it seems to me most convenient here to exclude this latter use.

power are demanded by the civilised communities who have dealings with them:[1] and it is doubtful whether, even in such cases, more good than harm results from granting the demand.

Indeed, in modern political thought the connection between a political society and its territory is so close that the two notions almost blend, and the same words are used indifferently to express either: thus we sometimes mean by a "State" the territory of a political community, and we sometimes mean by a "Country" the political community inhabiting it. We speak of crossing the boundaries of a "state," and we say that a "country" has made up its mind.[2]

So far I have considered the unity of a State as depending solely on the fact that its members obey a common government. And I do not think that any other bond is essentially implied in the definition of a State. But we recognise that a political society is in an unsatisfactory and comparatively unstable condition when its members have no consciousness of any bond of unity among them except their obedience to the same government. Such a society is lacking in the cohesive force required to resist the disorganising shocks and jars which foreign wars and domestic discontents are likely to cause from time to time. Accordingly, we recognise it as desirable that the members of a State should be united by the further bonds vaguely implied in the term Nation. I think, however, that the implications of this important term are liable to be obscured by attempts to give them great definiteness. I think it impossible to name any particular bond of union among those that chiefly contribute to the internal cohesion of a strongly-united society—belief in a common origin, possession of a common language and literature, pride in common historic traditions, community of social customs, community of religion—

[1] Thus Europeans are not justiciable by native courts in the Turkish dominions.

[2] In ancient Greek thought a corresponding fusion took place between the notions of "City" and "State," represented by the one word πόλις.

which is essential to our conception of a Nation-State. In popular talk it is often assumed that the members of a Nation are descended from the same stock; but some of the leading modern nations—so called—are notoriously of very mixed race, and it does not appear that the knowledge of this mixture has any material effect in diminishing the consciousness of nationality. Again, the memories of a common political history, and especially of common struggles against foreign foes, have a tendency to cause the community of patriotic sentiment which the term "nation" implies: still, the present imperfect cohesion of the Austro-Hungarian State shows that this cause cannot be counted upon to produce the required effect. In the case just mentioned differences of language seem to have operated importantly against cohesion: and indeed in most recent movements for the formation of states upon a truly "national" basis—whether by aggregation or division—community of language seems to have been widely taken as a criterion of nationality: still, it seems clear from the cases of Switzerland on the one hand and Ireland on the other, that community of language and community of national sentiment are not necessarily connected. Again, at certain stages in the history of civilisation, religious belief has been a powerful nation-making force, and powerful also to disintegrate nations: but these stages seem to be now past in the development of the leading West-European and American States. I think, therefore, that what is really essential to the modern conception of a State which is also a Nation is merely that the persons composing it should have a consciousness of belonging to one another, of being members of one body, over and above what they derive from the mere fact of being under one government; so that, if their government were destroyed by war or revolution, they would still hold firmly together. When they have this consciousness we regard them as forming a "nation," whatever else they may lack: thus we should speak without hesitation of the Swiss nation, because we attribute to the Swiss this community of patriotic sentiment, in spite of differences of language and

religion; but we could not properly speak of the "Austrian nation," whatever stability we may attribute to the Austrian —or Austro-Hungarian—State: because we do not conceive the members of this State as united into one whole by any such *esprit de corps*.

The difference between "State" and "Nation" may be illustrated further by the modern term "nationality," used in a concrete sense, to denote a group of human beings. For by "a nationality" we usually mean a body of human beings united by the kind of sentiment of unity or fellow-citizenship that is required to constitute a nation, but not possessing in common an independent government which they alone permanently obey: being either divided among several governments, or united under one government along with persons of a different nationality. Under either of these conditions, such a nationality, in modern Europe, usually desires—and if occasion offers, strives—to become a nation; but not always, as the persons composing it may think themselves unable to maintain their independence alone—as is the case (*e.g.*) with the Magyars in the Austro-Hungarian State. Still, even in such cases as this latter, the persons belonging to the nationality are conscious of a certain *artificiality* in the composition of the larger political whole of which the nationality forms a part.

§ 3. According, then, to what I have called the "practical ideal" of modern Europe, it is held to be desirable that a State should be coextensive with a single nation, in the sense above explained. How far, when this is not the case, any portion of a State may claim the right to secede and form a separate political community, or join an existing foreign state, is a difficult question; the final consideration of which will be more conveniently undertaken after we have gone through the discussions that are to occupy the second portion of this work, on the structure of government and its constitutional relations to the governed. Still, some provisional answer to this fundamental question is here required, before we pass to consider the normal external relations of States: I propose, therefore, to give here as accurately as I can the

general views that I conceive to be entertained as to the "Right of Disruption" by the majority of thoughtful persons at the present time, together with what appear to me the main grounds for these views.

In the first place, though the right of expatriation is not formally conceded by modern governments generally to their subjects,[1] there would be no serious disagreement as to the expediency of allowing discontented members of a State to sever themselves from it, if at the same time they permanently quitted its territory;—at any rate, if their departure did not involve the violation of any special or temporary obligations to the State or to individuals. Suppose, for instance, that any number of Collectivists wished to leave any West-European State, in order to try the experiment of Collectivism on hitherto unoccupied lands in Africa, I conceive that no serious opposition would be made to their collective expatriation; except that in a State that had established compulsory military service, their departure might have to be deferred until their respective terms of service had been completed. Speaking broadly, then, we may say that the practically serious issue as to the Right of Disruption relates not to the mere secession of a group of the members of a State, but to their secession with a portion of the State's territory. On the other side, few would contend that any landowner has a right to secede with his land from the State to which he belongs: or that any number of such landowners, scattered through the territory of a State, but not forming with other would-be seceders a local majority in any considerable district, would have a right to secede and form a new political community, exercising dominion over this aggregate of fragmentary lands. Any such claim is excluded from serious discussion by the palpable and extreme inconvenience that its realisation would obviously cause.

[1] In 1868, an Act was passed in the United States affirming that "the right of expatriation is a natural and inherent right of all people;" but I do not think that any European Government has ever expressly admitted this or any equivalent proposition.

We may, therefore, state the main issue as to the Right of Disruption as follows: If in any continuous part of the territory of a State, sufficiently large to form the territory of a new independent State, or capable of being conveniently united to an existing state, there is a decided local majority in favour of separation, has this majority a legitimate claim to secede, carrying with them the portion of territory over which their secessionist majority extends? I think we may say that a claim of this breadth would not be generally admitted, merely on the ground that the interests of the seceders would be promoted or their sentiments of nationality gratified by the change—that some serious oppression or misgovernment of the seceders by the rest of the community,—*i.e.* some unjust sacrifice or grossly incompetent management of their interests, or some persistent and harsh opposition to their legitimate desires,—would be usually held necessary to justify the claim. If no adequate justification of this kind appeared, the forcible suppression of any such attempt at disruption would be approved by the majority of thoughtful persons.

In examining the grounds and conditions of this view, we may put aside the survivals of the mediæval conceptions of government, which, until recent times, caused certain royal families to be widely regarded as having quasi-private rights of ownership over certain territories and rights to the allegiance of their inhabitants. Notions and sentiments of this kind have not ceased to have some force; but their influence is comparatively feeble and on the whole steadily diminishing: and for the purposes of the present discussion they may be regarded as antiquated. I shall also put aside for the present the question of the right to repudiate the results of unjust conquest, which will come under our consideration in the course of the two following chapters.

Putting the rights and wrongs of conquest on one side, I conceive that both the strength of the resistance that would be made to disruptive movements by a modern State, — of which the American Civil War of 1861 gave a

striking example,—and the general approval that would be given to such resistance, depends largely on the degree of disturbance that the disruption would cause in the foreign relations of the disrupted State; either through the increased danger of war from the addition of the seceding community to the number of possible foes, or from the mere loss of strength and prestige. Thus the intensity of the aversion felt by the Northern States of the American union to the secession of the Southern States seems to have been mainly due to the fear of future hostilities between North and South, complicated by the intervention of European powers: and it is difficult to deny that the present hopeful prospect—which secession would have destroyed—of maintaining internal peace over the whole vast tract of territory held by the United States, was worth a considerable sacrifice of lives and wealth.

In most cases, a further strong argument against disruption would arise from the inevitable incompleteness of the local separation between the seceders and the rest of the community: the territory which secession would break off would usually contain a minority of inhabitants loyal to the old government, who would be likely to suffer seriously from the change whether they remained within the disrupted district or migrated from it. Hence a tranquil acceptance of the disruption could not fail to have partially the character of a weak and base abandonment of friends. I conceive that the loss of Schleswig-Holstein would have been less strongly resisted by Denmark, had there been no considerable number of loyal Danes in North Schleswig; on the other hand, if the Danes in North Schleswig had been sharply and clearly separated from the Germans, I imagine that less resistance would have been made on the German side to a separation of Schleswig into a Danish and a German part, and a union of the former with Denmark.

Other minor disadvantages of disruption would vary in nature and extent in different cases. The loss of the disrupted district might be specially serious, from its contain-

ing mines or other natural resources, in which the rest of the State's territory was deficient. Again, the burden of a national debt might be seriously increased by the diminution of the wealth and population consequent on the disruption: and though the payment of a proportionate share of the debt might of course be demanded from the seceders, it might be difficult and costly to enforce the demand: indeed the desire of avoiding this share of the burden of debt might conceivably have been an illegitimate motive to secession.

But over and above these calculations of expediency, justifying resistance to disruption, we must recognise as a powerful motive the dislike of the community from which secession is proposed to lose territory that has once belonged to it, and to which it has a claim recognised by foreigners. This sentiment—so far as it goes beyond a rational aversion to lose a source of wealth and of strength in international conflicts—seems an outgrowth of patriotism analogous to the strong feelings of attachment to land or other property which long and undisturbed private ownership tends to produce in individuals and families. Such feelings must be taken into account as normally strong motives to action, no less than the feelings of mistrust or dislike of persons of different speech, customs, or religion, which operate in favour of disruption.[1] They are intensified by the close connection established in current thought between political societies and their territories: in consequence of which the characteristics of the territory inhabited by the nation commonly occupy a prominent place in appeals to national sentiment. Our imagination seems to require this embodi-

[1] I may notice here—what I shall have occasion to consider more fully hereafter—the distinctly lower degree of aversion with which disruption is usually regarded if the territories which it is proposed to separate politically are physically divided by a considerable interval. This is partly because the state formed by the union of these divided territories is *primâ facie* less suitable for common government, from the greater difficulty of communication among its parts and of defence against external foes: but the effect of imagination in causing the union in this case to seem less "natural" must not be overlooked.

ment to constitute an adequate object of patriotic devotion; so that in thinking of the "sea-girt isle" of Britain, or "la belle France," we do not ordinarily separate the community from the land, but blend the two into one notion.[1]

§ 4. As I have already said, I regard it as premature here to attempt a final solution of the problem presented by the conflict of sentiments and interests which I have indicated in the preceding section: my present aim is merely to justify a provisional acceptance of the assumption that a modern state is normally a determinate and stable group of human beings, whose government has an undisputed right of regulating the legal relations of human beings over a correspondingly determinate portion of the earth's surface. This assumption granted, we have now to consider how new membership of such a society is to be acquired? To attach it to mere local habitation within the territory of the State is obviously inexpedient: if a foreigner landing in England or France at once became an Englishman or a Frenchman, the inevitable result would be either to dissipate the sentiment of nationality which we have just seen the importance of maintaining, or to hamper intolerably the intercourse between nations. Hence, in all modern States, the distinction between members, and aliens residing within the territory, is maintained; and it is agreed that application of the law of a State to resident or travelling aliens should be limited to those matters in which the admission of diversity of laws would be dangerous or seriously inconvenient to members.

How, then, is membership of a political society to be determined, if mere local habitation is not sufficient to determine it? There are two obvious alternatives, (1) Birth—which again may be understood to mean either "birth from parents who are members" or "birth within the territory"—and (2) Consent. The proper method would seem to be a combination of the two principles: and in fact, in all

[1] To this close connection of the conception of a modern nation with that of its territory we may partly attribute the idea that a nation has a right to certain "natural boundaries,"—which has had an important influence on the political movements of the present century.

modern States, membership is actually determined in this combined way,—the combination varying slightly in different States. Ever since political societies have existed, the quality of membership has been handed down from parents to children, along with the common language, customs, and traditions that constitute the normal bonds of national unity: thus in any modern country the great majority of the inhabitants—born from native parents and on the soil—have been regarded as inchoate members from their birth, and as they grow up have assumed the rights and obligations of full membership, without any formal act of consent. With regard, then, to this great majority, it would be superfluous and disturbing to admit any doubt as to their membership, so long as they remain within the territorial limits of the state; the only question practically important—apart from revolutionary changes, tending to the formation of new States—is whether they should be free to leave the community. On this point, as I have already said, the principle of Consent has so far prevailed that freedom of emigration is now practically universal in modern civilised communities: and it seems clear that any substantial and permanent restrictions on such freedom would be out of harmony with the ruling political ideas of these communities. National sentiment, indeed, would condemn any one who left his "country" in a crisis in which she had need of his devotion: but it is clear that, in ordinary times, a State framed on a mainly individualistic basis, and therefore not undertaking to secure its members subsistence—beyond a minimum given under deterrent conditions—could not consistently keep them from seeking their livelihood elsewhere. We may lay down, then, that expatriation is to be free, and renunciation of citizenship,—with certain restrictions to prevent the evasion of special or temporary obligations—but on condition of leaving the country. So far as I know, it has never been even proposed that members of a State should be allowed to renounce citizenship while remaining within its territorial limits; but in most countries it is possible for a citizen to expatriate himself, acquire a new nationality, and then

return to live in his native land as a resident alien. It is, however, clearly inexpedient for a State that this course should be extensively adopted, in order to escape the burdens of citizenship; and, if it were extensively adopted, some measures would doubtless be taken to redress the balance between the burdens and privileges of citizenship, and to make the position of a resident alien clearly less desirable than that of citizen.

It remains to consider the conditions under which aliens generally should be admitted to (1) residence and (2) citizenship: but the consideration of the former question cannot well be separated from the discussion of the external relations of States, to which I shall proceed in the next chapter.[1] Here, then, I shall only point out that the residence of a large number of persons permanently excluded from citizenship within the territory of any community involves an obvious danger of weakening the internal coherence of the community. Accordingly, if a State permits the free immigration of foreigners, it seems expedient that admission to citizenship should be generally open to those resident aliens:—provided they have, by sufficiently long, orderly, and unblemished residence within its territory, both shown a settled preference for the social order that it maintains, and acquired a sufficient acquaintance with its laws and political habits to render it fairly probable that they will adequately perform the duties of citizenship.

A minor point that remains to be settled is whether parentage or soil is to decide citizenship, in the case of children born in the territory of a state other than that of which their parents are members. This question also belongs to the discussion of the external relations of States, so far as it is a matter on which agreement is desirable between the two states whose members and territory are respectively concerned. Considering it here from the point of view of the state in whose territory the birth takes place, we may lay down that, as in most but not in all cases the

[1] The question of restraints on immigratien will be discussed in chapter xviii. § 3.

children of resident aliens will probably desire to remain foreigners, it seems best that they should be allowed to choose their nationality when they come to years of discretion—unless the state in question aims at discouraging the residence of aliens. For the sake of domestic harmony it seems best that the nationality of a married woman should be merged in that of her husband; so that divided parentage will only occur in the case of illegitimate children, and it is comparatively unimportant how its effect on nationality is decided.

§ 5. I now pass to the second of the two fundamental questions announced at the outset of this chapter—viz., How far, within the limits of the modern country—assuming these determined in the manner which we have just been examining—governmental functions should be exercised over more restricted areas than that of the whole country?

So far as this question relates to the organisation of local governments, and the distribution of functions between local and central organs, its consideration more properly belongs to the second part of the treatise (see Chapter xxv.). What I propose here briefly to consider is not the organisation of government, but how far it is desirable that the effects produced by governmental action should vary from district to district, within the limits of the same State;—apart from any constitutional considerations that may render it expedient to maintain local independence. We might put the question thus:—Assuming any part of the human race inhabiting any given tolerably extensive portion of the earth's surface, to be under one wise government, however organised, how far would the laws and generally the action of government be the same for all? *Prima facie* this would seem to be desirable so far as human beings and their circumstances are similar, but only so far: and we know from experience of very important differences in men's physical, moral, and intellectual characteristics—especially when we compare men at different stages of civilisation—which may rationally determine a judicious government to act differently in their regard. But the consideration of such differences as

these, and of the variations in the functions and structure of government that may properly belong to them, lies for the most part beyond the scope of the present work; since I have assumed that our attention is here concentrated on the political relations of civilised men, having such characteristics as they are found to possess, on the average, in the most civilised communities. In such communities the politically important differences that we find in human beings considered as individuals, in most cases depend upon and are inextricably combined with differences, historically caused, in the structure of their societies:—due to the fact that different parts of a now united society have been previously under different governments, more or less independent: so that, when the question we are now considering is practically raised with respect to them, they not only have actually systems of law more or less divergent, but also their habits, customs, sentiments, expectations, are more or less firmly adjusted to these different systems. Under these circumstances we cannot lay down any general rules for determining when and how far such local divergences in law should be maintained, and when they should be obliterated: but the chief general considerations for deciding the question appear to be as follows:—

First, on the side of conservation we have (1) the general probability that a system of law which is the result of a gradual process of social development will have been adapted to the average needs, dispositions, and habits of the members of the society in which it is found; (2) the widespread friction caused by new laws jarring with old customs and habits; and (3) the more serious hardship in particular cases due to the disappointment of expectations naturally generated by the older condition of law and custom. On the other hand, annoyance and disappointment of a somewhat similar kind are likely to occur in a country where different districts under the same government have different laws, in the course of the transactions between inhabitants of different districts: and this latter evil tends normally to increase as time goes on, with the increasing mutual communication and inter-

fusion of the different portions of the community. The resulting inconvenience and mischief is likely to be much more serious in some departments of law than in others. Thus it is likely to be comparatively trifling in the case of the laws relating to the tenure of land: in which, at the same time, the considerations in favour of maintaining local divergences are likely to be specially strong. On the other hand, variation will probably be specially great in the case of commercial law, from the tendency of commercial relations to extend beyond the limits of a single district: and also in the law relating to domestic conditions, since the institution of the family is normally protected—as we have before observed—by strong moral sentiments, which are liable to be at once offended and weakened by the collisions between discordant rules.[1]

This question, however, cannot be finally dealt with apart from the considerations relating to the structure of government which will come before us in the second portion of this treatise. Leaving it for the present, let us turn to consider briefly the variations in law and in other forms of governmental interference, which may be rationally grounded on differences not in the nature of men or the structure of societies, but in their physical environment. Some departments of law scarcely admit of variation on this ground; thus (*e.g.*) the regulation of the family and the conditions under which it is expedient to enforce contract are not likely to vary with variations in the physical circum-

[1] As an American writer says, speaking from experience:—"Diversity of commercial rules in the several States impedes and annoys business, for American business pays little heed to State lines. Conflicting laws of marriage and divorce unsettle family relations, and undermine the moral basis of society. . . . It is possible that a man married in New York, divorced and re-married in Indiana, shall be the lawful husband of one woman in Indiana, and shall be regarded by the law of New York as the husband of another. By the law of Indiana his status is completely regular; by the law of New York he is a bigamist. He may have a second family of children who, by the law of Indiana, are legitimate, but by the law of New York are bastards." (Prof. Munroe Smith, on *State Statute, and Common Law*, in the *Political Science Quarterly* for March 1888.) It is in the part of the marriage-law that relates to the conditions of divorce, and of the remarriage of divorced persons, that variation is specially mischievous.

stances of different societies: and the protection of person and reputation from injury intentionally inflicted will be equally required everywhere. There are more likely to be important differences required in the governmental interference which I have distinguished as "indirectly individualistic"; especially owing to the peculiar dangers of mutual mischief which arise under urban as contrasted with rural conditions, from the closer packing of human beings: thus sanitary regulations are likely to be different in town and country respectively: it has even been said that "each town has its own drainage problem." Similarly, the protection against the introduction of diseases from abroad will require regulations on the borders of a country which will not be necessary in inland districts. Again, we have seen that the general principle of securing to each individual the fullest possible opportunity to employ his labour and undisturbed enjoyment of its results, has to be carried out differently in relation to different kinds of natural utilities: for instance, special regulations are likely to be necessary for mines, for fisheries, for forests; and these, by the nature of the case, are likely to be applicable to certain districts in the country and not to others. For similar reasons special kinds of the interference that we have called—in a wide sense—socialistic, may be only required in special localities: as (*e.g.*) for the draining of a marshy district, or for the irrigation of one deficient in water, or for the protection of low-lying lands against floods, or for the more elaborate provision of water for household use, which urban conditions render desirable.

## CHAPTER XV

### PRINCIPLES OF INTERNATIONAL DUTY

§ 1. I NOW pass to consider that part of the work of Government which is primarily external;—that is, which has for its end the maintenance of proper relations between the community governed and other communities and individuals outside it. As we have already seen (Chapter xi.), the existence of these external relations, in anything like their present form, must have very important effects on the internal relations of the community. Even in ordinary times, in most European States, the taxation required for the purpose of protecting the community and its interests against the attacks of external enemies exceeds that required for all its internal functions taken together; while in critical emergencies of war a government is commonly held to have a right to demand from the governed far more severe sacrifices, and even the most perilous personal services. Further, an important part of the duty of any government towards foreigners is to exercise adequate care in preventing its own subjects from doing them mischief. Hence the functions of government that are primarily external have in various important ways an internal aspect, which can never be altogether excluded; but for the present I shall concentrate attention on their external aspect, and accordingly endeavour to sketch in outline the conduct that States, as represented by their governments, ought to pursue towards other States and their members.

In framing this sketch I shall begin by assuming, as

the ultimate end and standard of right international conduct, the general happiness of all the human beings concerned, and not merely the interest of one particular State.[1] At the same time we must proceed on the assumption that a universal political order, maintained by a government representing the civilised part of humanity, is an ideal beyond the range of practical effort. We must suppose that civilised States are existing side by side under separate governments, exercising independent and supreme control over separate portions of the earth's surface; that, therefore, there is no central organ of legislation, by whose action any rule of international conduct which thoughtful persons may regard as desirable could be at once laid down as binding on civilised States generally; and no central executive able to crush any recalcitrant nation with irresistible force. How, under these circumstances, rules of international duty are to be introduced and maintained, I shall hereafter consider;[2] but at any rate we have to bear in mind, in framing a scheme of these rules for which we desire to obtain acceptance, that they must be such as an independent group of human beings can be made to obey, amid all the difficulties of the struggle for existence among individuals and societies; partly, no doubt, by their own sentiments of justice and humanity, but chiefly by their fear of the disapprobation of other nations, and the more or less indefinite danger of consequent hostile action on the part of these nations. Under these circumstances it seems doubtful how far the distinction between "legal" and "moral" rules and sanctions — which is of so great and pervading importance in the regulation of civil relations within a community—can be consistently or usefully applied to international relations. It seems best to discuss this question at the close of our examination of the principles of international duty. Meanwhile I shall avoid applying the term "legal" at all to the mutual claims of States; but it will be

[1] The difficult question presented by the apparent divergence, in certain cases, between the interest of a state and its international duty as here determined, will be discussed in a subsequent chapter (xviii). [2] See Chap. xvii.

sometimes necessary to distinguish what I will call "strict" duties, the violations of which I regard as wrongs justifying war in the last resort if reparation is obstinately refused, from merely unkind or unfriendly acts or omissions, which I only regard as justifying retaliatory unfriendliness and general disapprobation, but not breaches of international peace.

We may conveniently begin by considering summarily how far the different principles, by a combination of which, though in unequal proportions, civil order within a normal modern community has been seen to be regulated, are applicable to the relations of States.

In the first place, the absence of a supreme supervising government seems to exclude the possibility of "paternal" interference, except of a kind that would be unhesitatingly rejected in the civil relations of sane adults. No one would propose that a single private individual, or voluntary combination of private individuals, should be empowered—except under the strictest governmental supervision—to interfere with another sane adult for that other's good; the danger of such control being exercised in the interest of the protecting individual or group would be thought to outweigh any possible advantage to the person controlled. And a similar danger renders this kind of quasi-paternal control generally inexpedient in the case of States, at least if they are at all equal in grade of civilisation, and sufficiently coherent internally to be regarded as united wholes. It may, however, be sometimes advantageous for a weak State to be placed under the protection of a group of its neighbours, through whose mutual jealousies it may thus secure greater practical freedom from interference than if it were left in nominally complete independence: but this is hardly analogous to what we have called "paternal" interference. Again, a semi-civilised State may sometimes gain more than it loses by being brought into a condition of semi-dependence on a more civilised neighbour; but in the historical instances in which this relation has been established it has usually been by a self-interested encroachment of the protecting State, acquiesced in, rather than approved by, other nations; and the general

conditions of its legitimacy can hardly be distinguished from the conditions of legitimate conquest. The case for transient intervention, professedly in the interest of the state interfered with, when the unity of a state has been broken up by internal conflict, will be discussed later.[1]

Socialistic interference, again, seems almost out of the question in international relations, for the simple reason that so long as the concert of nations is ineffectual to prevent any one nation from doing mischief to another—and the continual frequency of wars shows that it is ineffectual—it would be almost futile to try to use it for the harder task of compelling mutual positive services. States have, indeed, combined in various ways—for instance, by international postal arrangements—for the promotion of their common interests; and it is eminently desirable that they should so combine. But, at least among States on an equality and sharing the same civilisation, common action of this kind has always been effected by voluntary combination; and I conceive that this must continue to be the case until the reign of peace among independent nations is finally established.

We are left, therefore, with the principle of mutual non-interference—interpreted as including fulfilment of contracts—as the principle almost exclusively applicable to the relations of civilised States. And historically this has been in the main the accepted principle of what has been known in modern times as International Law, so far as it has been conceived to be determined on rational principles, and not merely to depend on the written or unwritten conventions of states. When the real, though imperfect regulative influence that had previously been exercised over Western Europe by the unity of Christendom had finally collapsed in the religious wars of the sixteenth century, the need of establishing, on independent principles, a system of rules for the conduct of nations was strongly felt; and the void was supplied by the conception of the Law of Nature, which had been gradually formed in the development of mediæval thought, partly by

[1] See § 6 of this chapter.

tradition from Cicero through Augustine, and partly from the revived study of Roman Jurisprudence. According to this conception individuals had lived before the formation of civil society—and would always live, apart from positive law—under a system of rights and obligations imposed by the law of "natural" society, based mainly on the fundamental principle of mutual non-interference, interpreted to include the duty of observing compacts. It seemed clear that nations having no common government must form among themselves such a "natural" society; and, accordingly, the jurists of the sixteenth and seventeenth centuries, especially Grotius, tried to systematise and complete on the basis of this Law of Nature the body of rules governing international relations that had gradually come to be accepted. The system thus framed commended itself to thoughtful persons generally in the 17th and succeeding centuries;—indeed, as Maine says, "the great marvel" of the treatise of Grotius's *De Jure Belli et Pacis*, was "its rapid, complete, and universal success." And though the actual conduct of European States in these centuries has often deviated very widely from the recognised ideal of international duty, still the influence of this ideal has been sufficiently strong to make it practically desirable to work out here in a summary manner the application of the principle of mutual non-interference to international relations.

Before entering on this task it seems desirable to define more closely the sphere of application of the rules that we are about to lay down. It will be obvious that their observance cannot be regarded as strictly binding on States except in their dealings with other communities from whom reciprocal observance may reasonably be expected. But, in applying this maxim, a distinction has to be drawn between the general principles of abstinence from aggression and observance of compact,—applicable, as we have just seen, to the relations of individuals no less than to those of communities — and the detailed rules of international conduct, inevitably in some degree arbitrary, which have been accepted as the best attainable expression of these principles by the civilised States of Europe, and those of

European origin in America. It would be unreasonable to expect exact observance of these particular rules even from civilised States outside the circle of European civilisation within which they have been worked out, unless such states have in some unmistakable manner sought and obtained admission into the European state-system. But the general principles on which these rules are avowedly based, are of much wider application. There seems to be no class of societies—civilised, semi-civilised, or savage—in dealing with which a civilised state can be exempted from the obligation to observe these principles, unless it has clear positive grounds for expecting that they will be violated on the other side: though the precise forms of behaviour in which the general intention of avoiding injury to other communities will be most fitly expressed, will of course vary with the customs of these communities. In dealing, however, with uncivilised or semi-civilised communities difficult questions arise as to the interpretation of the duty of abstinence from aggression, and the manner in which it is to be reconciled with the legitimate claim of civilised communities to expand into unoccupied territory, and their alleged right—or even duty—of spreading their higher type of social existence. The consideration of these difficulties I reserve for a subsequent chapter (xviii): in the present and the following chapter our attention will be mainly confined to the rules of mutual duty which it is desirable to maintain among States thoroughly civilised.

So long as the relations of States are in a normal and peaceful condition, the main heads of international duty will coincide broadly with what we have taken to be the main heads of civil jurisprudence. We shall lay down as the main duty of a State to abstain from injuring any other state or its members (1) directly, or (2) by interference with rights of property, or (3) by non-performance of contract; and these three rules of duty, viewed in another aspect, will constitute the main international rights. But under all these heads new considerations of importance are introduced by the fundamental difference between the rights and duties of governments, as

at once representing and controlling their respective communities, and the rights and duties of private individuals; and, in particular, we shall have to extend the notion of "right of property" to include the essentially different right of governmental control over certain portions of the earth's surface. Then, carrying the analogy with civil rights further, we can see that if any of these rules is violated, the wronged State has a secondary right to reparation; and, if reparation is refused, or if the outrage is gross and deliberate, the exercise of force is legitimate for obtaining redress, and adequate security against repetition of the outrage. But in the absence of a common government of nations such exercise of force ordinarily leads to war; and we thus have further to consider how far and in what way the mutual relations of belligerents and neutrals can be regulated so as to minimise the mischiefs of war.

§ 2. In the present chapter I shall confine myself to examining the primary rules of normal and peaceful relations; in order to note and consider the special points that arise in trying to apply them consistently to determine international duties. It will be convenient to assume, in the first instance, that the communities in question are adequately represented by their respective governments, so that the action of any government may be regarded as expressing the united will of the community governed. Even on this assumption there are some very important characteristics peculiar to international as compared with civil duty, depending on the fact that the State is a whole composed of members having separate wills and interests. In the first place, the lines of separation between political communities are not perfectly definite, as we have seen in the preceding chapter. It is not quite clear who are subjects of any given government. In the great majority of cases there is, of course, no doubt: that is, there is no doubt that persons born within the territory of a State of parents belonging to it —or unknown parents—themselves belong to that State, unless their connection with it has been severed by some act done by it or them, designed to have this effect. But, owing

to the extensive interfusion of modern nations, there is a not inconsiderable margin of doubtful cases, as to which different nations take divergent views, and are liable to come into conflict. For instance, European nations disagree somewhat as to the national character properly belonging to children born out of their parents' country. The older view—to which England still adheres in principle—made the place of birth decisive: the newer rule, which since the code Napoleon has tended to prevail, makes the child follow the nationality of its parents. It seems to me desirable[1] that liberty of choice should be generally allowed in such cases; but it is, I conceive, in accordance with the principle of mutual non-interference that each State should have an unquestioned right of determining the national character of children born within its territory.

A more important difficulty has actually been presented in past times by the question whether the members of a community generally should have unlimited liberty of severing their connection with it by expatriation. Though in practice, as I have said, free emigration is now generally conceded by European States, a universal and unlimited right of expatriation is not yet generally admitted; and it is easy to see that where universal military service is compulsory it may be necessary to prohibit temporary emigration, lest it should take place widely with the view of evading military service. It would probably be inexpedient, even in this case, to take any measures to prevent such emigration, beyond the announcement of a penalty to be inflicted if the evasive emigrant returns; but however this may be, I do not think that any measures taken to prevent expatriation can, on the principle of mutual non-interference, be regarded as an offence by any other State, except so far as the persons whose expatriation is prevented are already claimed as subjects by that other State. On the other hand, it

[1] If it were found that this liberty gave too much encouragement to aliens, it would seem to me better to counteract it by disabilities of some other kind, rather than force on the children of resident aliens a nationality to which they were averse.

cannot be regarded as an interference that a foreign State should admit such an evasive emigrant to membership; but it seems clear that, on the principle that we are now taking as fundamental, it cannot reasonably claim to protect him, if he returns to his native land, from the penalty incurred by unlawful emigration.

We have seen that ordinary intercourse brings political societies into a condition of partial interfusion, to which nothing can correspond in the ordinary intercourse of human beings; in consequence of which each modern State contains a number of aliens residing temporarily or permanently within it. But on the principle that limits strict duty to non-interference, it must be competent for a State to prohibit this interfusion totally or partially: and if (as is the common view) we regard its rights over its territory as only limited by the duty of avoiding mischief to other States—according to the analogy of private rights of property—it must be competent for it to exclude inhabitants of other states altogether from its territory, without violation of duty. I conceive that this exclusive territorial dominion should be generally admitted—with a certain reservation in the case of States that claim the ownership of large tracts of unoccupied land—owing to the inconveniences and dangers of conflict that must generally attend any division or limitation of dominion: and, if so, a State must obviously have the right to admit aliens on its own terms, imposing any conditions on entrance or any tolls on transit, and subjecting them to any legal restrictions or disabilities that it may deem expedient. It ought not, indeed, having once admitted them, to apply to them suddenly, and without warning, a harsh differential treatment; but as it may legitimately exclude them altogether, it must clearly have a right to treat them in any way whatever, after due warning given and due time allowed for withdrawal. And if it may deal thus with aliens, it must clearly have similar rights in respect of its own alienated members. Doubtless such exclusive or differential treatment —unless justified as a necessary precaution against mischief to the State adopting it—is opposed to international morality

as wantonly unfriendly, and would justify retaliatory exclusion, or other unfriendly acts, though not war. But it can hardly be regarded as even unfriendly for a government to apply to aliens within its territory the laws and administrative measures that it applies to its own subjects, even if they do not accord with the alien's view of justice. Thus a Frenchman, holding land in Ireland, could not reasonably complain of being judicially forced to give his tenants "fair" rents, though he might reasonably complain if such a measure were applied only to lands held by Frenchmen. If, however, the laws of one nation (A) are designedly made, or designedly administered, so as to cause special loss or annoyance to the members of another nation (B) residing in the territory of A, B has clearly a ground of complaint, and a claim to reparation if the unequal treatment is applied without warning. And even if such special loss or annoyance resulted without design, complaint would not be unreasonable; but if such complaint had no effect, it would not be in accordance with the principle of non-interference for B to take ulterior hostile measures beyond breaking off communication with A; and probably it would not be expedient to do more than warn its subjects against travelling or residing in A.

§ 3. On the other hand, a state that has admitted aliens is bound not only to abstain from injuring them through the operations of its government,[1] but also to take due care to prevent its members from injuring them, so long as they are within its territory; and, where prevention has failed, to inflict punishment and provide reparation for any wrongs that they may have suffered. And, similarly, it is at all times the duty of a state to take reasonable care to prevent the inception within its territory of acts injurious to other states, or their members, intended to take effect outside its territory. And the extent of this obligation cannot, I conceive, depend on the internal constitution or condition of any country, at least so far as the duty of reparation goes.

[1] If such injury has been inflicted through the agency of governmental officials, their act should, of course, be disowned and compensation given; and, if the offence be grave, the official should be punished.

It may be admitted that a state is not "bound to alter the form of polity under which it chooses to live, in order to give the highest possible protection to the interests of foreign states;"[1] but if it prefers a polity that renders it more dangerous to others, it must take the risk of having to give more compensation for damage done to their interests. Other nations, on the principle of mutual non-interference, have no right to interfere with its constitution and laws, so long as its foreign obligations are tolerably fulfilled; but, correspondingly, it has no right to make them an excuse for non-fulfilment.

A precise definition of "reasonable care" can hardly be given; but it may be laid down that "somewhat more forethought in prevention of noxious acts is due during war", or internal disturbance in neighbouring countries, than in time of peace.

This duty of control, of course, extends to the case of the aliens to whom a state gives hospitality. It must take reasonable care to prevent them from doing mischief to its neighbours. This duty becomes important through the natural tendency of the law-breakers of any community to fly to neighbouring countries to escape punishment. Generally speaking, such law-breakers are likely to be mischievous where they take refuge, and it is the common interest of both the states concerned that they should be handed over for trial and punishment in the country whose laws they have broken. But there is likely to be some margin of disagreement between two states as to the kinds of acts that deserve punishment; and we cannot say broadly that every state is bound to accept any other state's definition of crime, and hand over for punishment persons whom it believes to be innocent. Its duty is only not to facilitate in any way the performance of future acts that it admits to be mischievous. It is,

[1] This quotation, and others in the present chapter, are from Mr. W. E. Hall's *International Law*. I may here take the opportunity of acknowledging my extensive obligation to this work, in composing the present and the following chapters.

indeed, conceivable that the mischief caused to a State by its neighbour's encouragement to law-breakers may be sufficiently grave to justify complaint, or even, in the last resort, forcible suppression: but such serious results are hardly likely to follow from any disagreement as to the definition of ordinary crime, if the neighbour is a civilised State in which order is tolerably maintained.

The chief practical difficulty arises in the case of what are called "political" offenders—that is, persons who have violated the laws of their country by acts designed to effect a change in its constitution. According to the principle of non-interference no State should do anything calculated to prevent (or cause) internal changes in another: and it would seem that the surrender of political offenders is an interference of this kind on behalf of the existing government. On the other hand, it is undeniable that the attempts of such persons, when made without adequate cause or reasonable prospect of success, may be mischievous in the highest degree: yet a State cannot generally be expected to undertake the responsibility of deciding how far any particular attempt at a revolution in a foreign State was justifiable. In this difficulty, the best rules seem to be (1) that a foreign State should not surrender fugitives whose alleged crime does not involve any wrong to private individuals, or any damage to the community, other than what necessarily attends interference with governmental functions; and (2) that it should not be bound to surrender them, even if they are accused of acts involving such wrong or damage, provided these acts were merely normal incidents in an attempt at revolution: but (3) that, if it does not surrender them, it is bound to take care that they do not use its territory as a basis for carrying on serious hostilities against their government,—by placing them if necessary under special control or supervision,[1] or even expelling them.

[1] I conceive, however, that it cannot be required to interefere in this way with the fugitives, to prevent acts which it would not regard as criminal if it were itself the object of them; for instance, a state which allows the bitterest attacks on its own government to be freely published cannot be expected to check similar free criticism on foreign governments.

The right of each State to exclude foreigners must extend, I conceive, in strictness, even to ambassadors or other agents of communication between States; a refusal to receive them cannot be held to justify war. But it is obviously most expedient, with a view to the maintenance of friendly relations between States, that such agents should not only be admitted, but received with special marks of courtesy; and even that special immunities from the jurisdiction of the foreign country in which they temporarily reside should be granted them—partly from considerations of courtesy, partly to secure the independence of action which the functions of these officials require.

§ 4. The distinction between offences against government and offences against individuals assumes special importance, and raises some special difficulties, when we pass to consider the international right of a community to its land. The modern nation, as we have seen, is inseparably connected with its territory—the very idea of a modern state involves the notion of dominion exercised over a certain portion of the earth's surface. Such dominion is of course distinguishable from private ownership so far as this extends; but it is so far analogous to private ownership from an international point of view, that it is commonly assumed to imply a right of exclusive use for members of the state exercising the dominion, even as regards portions of land which are kept common in use and management. But it must be observed that governmental ownership or dominion may reasonably be extended over parts of the earth's surface where there would be no reason for allowing the right of exclusive use: since the *rationale* of the two rights is essentially different, from the point of view of humanity at large. The main justification for the appropriation of land to the exclusive use of individuals or groups is that its full advantages as an instrument of production cannot otherwise be utilised; the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured. Thus,

when piracy was a common danger of grave importance in the later mediæval and early modern period, any State that kept the peace of the neighbouring seas by putting down pirates, rendered an important service to traders generally, in return for which it might reasonably claim to exercise governmental control over these seas, and to levy tolls and dues to recompense it for the trouble and cost to which it was put. But the claim that some States put forward to close the seas so controlled by them against foreigners could not thus be justified: against this claim the argument of Grotius, that "the sea is large enough to suffice for all peoples for every use, either of drawing water, fishing, or navigation," was doubtless valid during this period.[1]

At present—piracy being reduced to a remote and occasional danger—the marine dominion of States is restricted by a rule generally accepted throughout the European group of States, to a narrow belt of water along the coast of a State's territory; and this is only allowed to be appropriated subject to a general right of peaceful navigation;[2] while beyond this limit the sea is now held to be common to all nations for all purposes. The breadth of the recognised belt of "territorial waters" is usually stated to be a marine league, with a somewhat larger allowance in the case of gulfs and bays enclosed by the land of one State:[3] it appears to have been originally determined by the supposed range of artillery. The exact limit must probably be always somewhat arbitrarily fixed: but the chief general grounds on which it should be determined may be stated to be (1) the need of as much control over the sea as is required for the security of the lives and property of the inhabitants of the land; (2) the

[1] *De Jure Belli ac Pacis*, II. chap. ii. § 3. How far this argument is now valid, so far as fishing is concerned, is more doubtful.

[2] It is widely held that this common right of peaceful navigation ought to extend to all navigable rivers; but the usage of nations does not yet impose the opening of such rivers, as a strict international duty, on the nations that own the banks.

[3] The definition of the generally received breadth is vague in this latter case, and seems to depend somewhat on the proportion of length to breadth. Perhaps "straits" should be put on the same footing as "gulfs and bays."

desirability that the government of each country should have the power of regulating the fisheries on its coast, to prevent wasteful exhaustion of the supply.[1]

The extent of the land belonging to different States is, of course, determined mainly by historical causes, with which we are not here concerned. New territory of any importance[2] can only be acquired either (1) from other States through cession, or conquest ripened by prescription, in either case usually in consequence of war; or (2) through the extension of dominion over land hitherto unoccupied by any civilised State. Of both modes of acquisition I shall have more to say in subsequent chapters (xvi and xviii); but as regards the latter, I may here notice certain questions which arise, somewhat similar to those dealt with in chapter iv, where the acquisition of private rights of landownership was discussed.

In the first place, granting the accepted view that no State infringes the rights of others by taking exclusive possession of unoccupied land, it is difficult to lay down precisely wherein "taking possession" should be held to consist, or how much land should be held to be brought under dominion by any given act of occupation. On both these points it has been the practice of the West-European nations — in the great process of expansion, by which more than a third of the land-surface of the globe has been brought under the sway of their civilisation — to make claims startlingly wide; and even, though to a lesser extent, to admit similar claims on the part of others. Thus "it has been common to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continual enjoyment or control; and it has become the practice in making settlements upon continents or large islands to

[1] This latter principle might be used to justify an extension of marine dominion beyond the limits now commonly recognised; and I am inclined to think that such an extension will be generally allowed as the need of restricting the freedom of fishing grows more urgent.

[2] I pass over, as insignificant, changes in water boundaries arising from fluvial deposits or similar causes.

regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land." For instance, "it has been maintained that the whole of a large river basin is so attendant upon the land in the immediate neighbourhood of its outlet that property in it is acquired by merely holding a fort or settlement at the mouth of a river." Such claims as these cannot but appear extravagant from a theoretical point of view. It does not seem to me that a State can claim, as a strict right, to exclude other States from territory over which it is not exercising a tolerably effective and continuous governmental control; though it would be clearly unfriendly on the part of any State to occupy, in the neighbourhood of the settlements of another, land over which these settlements may be naturally expected to expand within a reasonable time, or land specially important for the security of such settlements. Usage, no doubt, has allowed as legitimate much wider claims than this principle would admit; but I conceive that usage in this respect is likely to grow stricter as the world grows fuller.

But secondly, I do not think that the right of any particular community to the exclusive enjoyment of the utilities derived from any portion of the earth's surface can be admitted without limit or qualification, any more than the absolute exclusive right of a private landowner can be admitted. The rigour of this right has hitherto been mitigated, in modern States generally, by the practical allowance of free immigration; but if this should ever be sweepingly barred, I conceive that the right of exclusion would be seriously questioned in the case of States with large tracts of waste land suitable for cultivation; and that some compromise would be found necessary between the prescriptive rights of the particular State and the general claims of humanity. On the one hand, no well-ordered community could reasonably be required to receive alien elements without limit or selection; on the other hand, an absolute claim to exclude alien settlers adequately civilised, orderly, and self-dependent, from a territory greatly underpeopled, cannot be justified

on the principle of mutual non-interference. On similar grounds I should hold that dominion over the sea ought not to be used for the purpose of excluding aliens from fishing in the seas controlled, provided they submit to the regulations necessary to prevent exhaustion of the fisheries, and pay an equitable share of the cost of such regulations.

Finally, it must be observed that in discussions among civilised States as to the occupation of new territory, the claims of the uncivilised tribes to the lands in some sort occupied by them have been usually ignored. Such claims, however, cannot be left out of account in any statement of the general principles of international duty. It does not indeed seem to me that the moral claim of savages to their hunting-grounds can be allowed, in the interest of the human race, to override the claim of civilised races to expand: on the other hand, I regard it as the plain duty of the latter to make every effort to secure to the savages as full compensation as possible for the utilities of which they are deprived, and to extend to them such share of the advantages of civilisation as they are capable of receiving. To what extent, and by what means, this result can be brought about, I shall hereafter consider.[1]

The preceding discussion has led us to take note of the large portion of the earth's surface that lies outside the territory of any State; the most important part of this is the open sea, which forms the common highway for the ships of all nations. To prevent confusion and friction it is expedient that members of any State should, as far as possible, continue to be governed by the law of their own community, when they are in this region of no-government. Hence (1) the civil relations of members of the same State should continue to be governed by their own law; and (2) in any voluntary transactions between members of different communities, the obligations incurred by each should be the obligations that his own law would have imposed on him, unless it can be shown that he intended to incur further obligations; and (3) each government, in fulfilling its general

[1] See chap. xviii, § 8.

duty of protecting its subjects from mischief outside the limits of civilised States, should show as much regard as possible for the governmental rights of other powers, by allowing, as a general rule, that wrongs inflicted by foreigners be redressed and punished by the courts of the latter—provided that tolerable redress can thus be attained.

There is however an important exception to the rule last stated. The crew of any vessel ordinarily forms an organised body under a (subordinate) government, which has special powers determined by the government of the community to which the vessel belongs; and it is expedient for the maintenance of order that these powers should extend to the repression of wrongs committed or threatened by any person on board the vessel, to whatever state he may belong.

§ 5. Let us pass to consider the obligations arising out of the contracts of a State with foreign States or individuals. As regards the latter there is not much to be said; when an individual incurs damage through violation of contract by a State, he has, generally speaking, a claim to adequate compensation similar to what he would have if a fellow-citizen had broken faith with him, which it is the strict duty of the offending State to satisfy; provided always the contract has not been vitiated by fraud. How far it is expedient that his claim should be enforced, if necessary, by violence on the part of the community of which he is a member, must depend on circumstances. It is noteworthy, however, that failure to pay debts to private persons on the part of a State is not usually treated as an international offence, probably on account of the laxity of bankruptcy law in modern States generally; though it might in particular cases be so treated if the failure could not be justified by the financial necessities of the defaulting State.

It is more important to note the different conditions under which contracts have to be held valid as between State and State as compared with contracts between citizens. In either case it is manifest that a contract cannot be binding which has been obtained by fraud; and personal violence exercised on a government or its agents, to obtain their

consent by terror, must be held to invalidate an international compact as it would a compact between individuals. But violence exercised on a State by war cannot be held to have this effect; since war, as we have seen, is, in the last resort, the only normal means to which a State can have recourse to obtain reparation for wrong and adequate security against its repetition. Hence the fulfilment of onerous conditions enforced by a victor who had just cause for war, so far as they are not manifestly in excess of due reparation or the requirements of future security, must be held to be as clearly binding as any other international duty.[1] The case is no doubt theoretically different where the conqueror was in the wrong; and even where he is in the right, if the terms offered by him to the vanquished are immoderate in their rigour. But even here expediency forbids us to lay down broadly that a treaty made under unjust coercion is simply invalid; since the universal adoption of this principle would greatly aggravate the evils of unjust victory: it would be the interest of the conqueror to crush his enemy completely and relentlessly, as he would no longer be able to trust his engagements. In this difficulty international morality seems practically to be forced to a rough compromise, which will be considered in the next chapter, after we have discussed generally the regulation of war and its effects.

§ 6. So far we have assumed States to possess substantial internal cohesion. We have now to consider a new class of questions which arise from the fact that this internal cohesion is liable to be broken, so that States undergo a process of internal disorder caused by the insurrection of a part of the community. This process may aim either (1) at revolution, substituting a new government for the old over the whole community; or (2) at the disruption of a part of

[1] It must be admitted that this distinction can hardly be expected to have any important practical application until international morality is materially improved. At present it would be difficult to find a case in which the moral opinion of the civilised world was sufficiently clear and decided as to "just cause of war," "due reparation," and "adequate security," to exercise effective restraint on any state that found itself enjoying a favourable opportunity for shaking off onerous conditions.

the community from the rest, with a corresponding portion of territory, and in either case it may be more or less slow and prolonged, and may end either in failure or success.

What then is the duty of other States in relation to these processes? On the principle of the mutual non-interference of States, which we have hitherto been applying, the process of revolution is an internal affair with which foreign governments are not concerned;—except transiently, if the conflict between the party of order and the revolutionists is sufficiently obstinate and prolonged to assume the dimensions of civil war, so that other states, in order to carry out the rule of non-interference, are forced to take up towards both contending parties the attitude of neutrals towards belligerents. This latter point of international duty will be more conveniently considered in the next chapter. In any case, when the process of revolution is over, the international rights and obligations of the state that has passed through it will revive unchanged, whether that state be under its old government or under a new one.

The case is different with disruption. If this process be successfully carried through, it will be the duty of other states who wish to adopt an attitude of perfect neutrality, to recognise at a certain point of time that a new political community has come into existence, to which they must accord the ordinary rights of an independent state, while claiming from its government the fulfilment of customary international obligations. And it may often be a delicate matter to determine the exact point of time at which this recognition is to take place; since, to accord it too soon, would be showing undue partiality to the disruptionists, while to delay too long would be an offence to the new-born state. If the government of the old state itself recognises the independence of its revolted province, as soon as its struggle to retain it is substantially over, the difficulty will be removed; but if it clings to the claim of supremacy after it has ceased to make serious efforts to realise it, its obstinacy cannot justify other States in postponing recognition. They must judge for themselves when the substantial

struggle is over, and must recognise the government of the insurgents as having succeeded, generally[1] speaking, to the international rights and obligations of the previous government, in respect of the persons and territory that are *de facto* under its control at the time of its recognition. Some difficulty, however, may arise as to the division of obligations—especially debts. It is clear that the government of the new State must be held responsible for all such debts of the old State as were specially connected with the disrupted province—either as being contracted for local purposes or secured on local revenues. On the other hand, it seems clearly just, under ordinary circumstances,[2] that the general debt of the old State, so far as this debt was incurred while it included the disrupted province, should be divided equitably between the two independent States that have resulted from the process of disruption. But the division ought to be made by treaty between the disrupted communities; and if no treaty is made the community that claims to represent the previously existing state must be responsible for the whole debt, as for any other obligations arising out of contract, where the possession of a certain territory was not an express or implied condition of the contract. Only if no one of the disrupted fragments claimed a continuity of existence with the previous state, would a division of the obligations of the previous state among the fragments have to be undertaken by foreigners to protect their own interests; but this case is likely to be rare.

So far I have assumed that the duties of foreign states are to be determined on the principle of non-intervention. But the analogy between states and individuals, on which we have been working throughout, fails in a marked manner when a state is torn by violent civil dissensions: foreign

[1] I say "generally," because sometimes special rights may have been granted, or obligations imposed, in view of considerations which disruption has annihilated.

[2] This qualification is intended to exclude such cases as that of (1) a colony which had never shared the burden of the mother country's debt; or (2) a province which had been conquered and never really submitted.

states—if they would not have their conduct regulated by empty fictions—must recognise that in this case the quasi-personal unity which international morality attributes to states has vanished; and that they have practically to deal with two bodies instead of one, each accusing the other of violations of right grave enough to justify a resort to force. The principles on which violent insurrection and violent repression of insurrection are respectively to be justified have already been partially considered, and will be further discussed in the concluding chapter of the treatise: but—assuming that there are some cases in which the insurgents would have right on their side and others in which they would be in the wrong—we may here note certain general considerations bearing on the expediency of foreign states intervening in such cases on either side.

An attempt to change violently the government of a country may arise in two ways; either from a dispute between two of the recognised organs of government, in which neither will give way, or from an insurrection of the governed generally — or a portion of them — against the government as a whole. In the former case the conflicting organs, in endeavouring to enforce their respective claims by arms, are appealing to the people governed to decide the point at issue: and the people to whom appeal is thus made, if sufficiently coherent to deserve the name of a nation, must generally be far better qualified to decide it than foreigners can be; so that the intervention of the latter is likely to be simply mischievous. The mere fact that the claims of one of the contending organs are traditionally established, while those of the other are revolutionary, does not materially affect the case; for the change may be opportune and desirable—the ripe fruit of time, though needing to be violently plucked. There is further a serious danger that if intervention be tolerated, the intervening State or States will take advantage of their neighbour's weakness to secure some unjust gain at its expense; and that this ill-gotten gain will carry with it the seeds of future bitterness and strife. Such inter-

vention, therefore, should generally be viewed with reprobation.

There are, however, special grounds on which, even in this case, intervention may be justified:—thus, *e.g.*, the revolutionary party may adopt an aggressive attitude towards foreigners, by acting avowedly on principles which they not only profess to be applicable to other States, but which they threaten to aid in applying elsewhere if they succeed at home. Only, to give the required justification, the aggressiveness ought to be definite and unmistakable, otherwise the foreign intervention will be justly open to the charge of causing the evil that it is designed to avert.

The case of an insurrection by the governed against the government as a whole, differs from that just discussed, chiefly because it is more likely to occur in what has been called an "inorganic"[1] state;—*i.e.* one in which the rule is that of an alien element supported by an army divorced in feeling from the rest of the population. The community thus artificially held together lacks the kind of cohesion that constitutes a nation; and this is also likely to be the case where the aim of insurgents is what I have called "disruption," *i.e.* to secede from the State to which they belong with a portion of its territory. In either of these cases the intervention of a foreign State on the side of the insurgents is not equally open to the objection of interfering with an appeal to the nation, as the proper final arbiter of internal disputes: and if it appears that the contending parties are deeply and irreconcilably divided in national sentiment, such intervention seems admissible, under such conditions as would render it expedient in wars between independent States: *i.e.* if it is likely to be effective to secure peace and tends to prevent injustice. Still even in these cases the danger of its being partly designed to further the aggrandisement of the intervening States must not be overlooked.

[1] The term is Mr. Seeley's.

## CHAPTER XVI

### THE REGULATION OF WAR

§ 1. As has already been pointed out, any serious and unprovoked violation of strict international duty gives the State whose rights are violated a claim to reparation; and if reparation be obstinately refused, the offended State must be held to have a right to obtain it by force, with the aid of any other States that can be persuaded to join it. This exercise of force need not necessarily amount to war; for instance, if the property belonging to a State or any of its members has been unjustly seized by another State, reparation may be obtained by "reprisals," *i.e.* by seizing the property of the offending State or its members, provided the public faith of the retaliating State is not pledged to its protection.[1] It is possible that this exercise of force, if carefully limited to the exaction of redress, may be followed by negotiation and amicable settlement; but it is too probable that it will lead to the general rupture of peaceful relations—that substitution of physical conflict for verbal discussion, which we call war.

The refusal of reparation cannot be regarded as obstinate, if the inculpated State is willing to accept the decision of an arbitrator on the claims urged against it. And I think it very important that all who desire peace and justice should urge the adoption of this method of settling disputes, wherever there are not strong reasons for regarding it as

[1] This proviso is inserted to exclude repudiation of debts due to subjects of the offending State: a procedure, however, from which modern States will usually be restrained by the fear of losing their credit.

impracticable; since an extension of arbitration seems the most hopeful means of reducing the danger of war among civilised States. At the same time, it is no less important to consider carefully the inevitable limitations of the sphere of practicable arbitration.

1. The violation of right may be a continuing evil, which requires immediate abatement as well as reparation; and the violence required for this abatement is likely to lead to further violence on the other side; so that the conflicting States may be drawn into the condition of war by a series of steps too rapid to allow of the delay necessary for arbitration, and which involve so many fresh grounds of complaint, that the decision of the original dispute may easily sink into unimportance.

2. The interests at stake may be so serious that a State, believing itself able to obtain redress by its own strong hand, cannot reasonably be expected to run any serious risk of a wrong decision on the part of the arbitrator. And such a risk is likely to occur when the dispute is one that involves a disagreement on principles of international duty, widely extended among civilised States; since in such case it will be difficult to find an impartial and trustworthy arbiter. Thus, during the sixteenth and seventeenth centuries, it would have been difficult to find such an arbiter in Europe in any quarrel between a Catholic and a Protestant State; and in the nineteenth century, it would be difficult to find such an arbiter, in any quarrel caused by the claims of a nationality struggling for independence.

3. The weight of the consideration last mentioned is increased when we take into account the inevitable vagueness and uncertainty in which many important points in the determination of international duty are involved. This will appear from the present and preceding chapters, so far as the theoretical determination on principles is concerned; while in the next chapter it will be shown that further difficulties arise when we try to settle the limits of strict—or "legal" international duty by reference to established usage. In consequence of these uncertainties and difficulties, even

where there is no definite conflict of principles, the ties of interest and alliance that bind nations together may render it difficult to find an arbiter whose absence of bias can be trusted when the interests at stake are grave: and it is difficult to say how their legitimacy could be determined by any rules that an arbitrator could apply.[1]

A portion of the obstacles to arbitration just stated would certainly be diminished, if civilised states could be induced to agree on the appointment of a standing Court of International Arbitration, to which questions might be referred for decision by the consent of disputant States.[2] Still the danger of bias would not be removed; and it would still be very doubtful whether, in disputes in which serious national interests were at stake, the government of a powerful state would feel justified in incurring the danger,—even supposing it to be sincerely desirous of subordinating national interests to international justice. In such cases peace might often be more likely to be preserved by conciliatory efforts to find through direct negotiation a tolerable compromise between the conflicting interests of the disputants, than by insisting on arbitration.[3]

Historically, the two causes of bias that I have distinguished have often operated together. The most serious wars of the European group of States have been the combined results of conflicting fundamental principles, religious or political, and conflicting national or governmental interests of great—real or supposed—importance: and where such conflicts arise, arbitration is rarely likely to be an acceptable means of preserving peace; since the conflict of principles makes it difficult to find an arbiter whose decision both sides

[1] Some further discussion of the problem presented by a conflict between the claim of national interests regarded as imperative and established rules of international duty will be found in the following chapter xvii, § 2.

[2] As proposed by Maine in his (posthumously published) lectures on *International Law*, Lec. xii.

[3] I have not noticed difficulties of detail in the way of arbitration,—such as the difficulty of attaining agreement as to the scope of an arbitrator's inquiry, and the facts he is to take as accepted by both disputants. Difficulties of this kind are not unfrequently found to mar an otherwise fair prospect of settlement by arbitration.

can sincerely acquiesce in as just, while the magnitude of the interests at stake makes acquiescence in an unjust decision appear a supine and cowardly abandonment of patriotic duty.

4. We must also take note of the cases where open and avowed invasions of international rights are resorted to as a measure of self-protection on the part of the invading State, without any hostile intent—as in the famous seizure by England of the Danish fleet in 1807. Such measures may be justified as necessary to the self-preservation of the State that resorts to them; but it can hardly be expected that the State that suffers from them will patiently submit to them, if it has any reasonable prospect of success in war.

Supposing war inevitable, we have to consider what rules can be laid down for the conduct of the States engaged in it, or of other States.

In the first place, we cannot lay down, on the principle of mutual non-interference, that it is the strict duty of any State, other than those between whom the quarrel has broken out, to take part in the war. If, however, there is a general agreement as to the right and wrong of a quarrel, I think that it is, generally speaking, both the duty and the interest of neighbouring States to take the risk of threatening intervention to prevent manifest aggression, if there is a fair prospect of forming a league of States for the purpose of such intervention, so strong as to render resistance on the part of the aggressor improbable. I think that the formation of such leagues is the most hopeful mode of preparing the way for a permanent federation of civilised States, strong enough to prevent wars among its members. If, however, there is no general agreement as to the side on which justice lies, or if, for some other cause, it is impossible to form a league of decisive strength on behalf of what is recognised as justice, it will be generally the duty and the interest of the neighbouring States to adopt the attitude of strict neutrality, in order to avoid useless and dangerous extension of the evils of war.

Accordingly, in formulating the rules which civilised opinion should attempt to impose on combatants, we must

abstract from all consideration of the justice of the war; we must treat both combatants on the assumption that each believes himself in the right, and that his object in fighting is to obtain due redress for wrong, and adequate security against its repetition: since, whether this be so or not in any particular case, it would be idle to try to subject an unjust combatant as such to any special restrictions or disabilities in the conduct of his war. For, even supposing that there is a decided preponderance of opinion in the rest of the civilised world in favour of one of the combatants; still the subjection of the other combatant to special disabilities could only be usefully enforced by a concert of nations which, if it can be made effective for this purpose, could doubtless be made effective for the prevention of the war altogether, and had much better be so employed.

§ 2. Let us consider, then, how the duties of a belligerent, fighting in the name of justice, and under the restraints of morality, are to be determined,—first, as regards his enemies, and, secondly, in relation to neutral States.

To begin with the mutual duties of belligerents. The general principle of such duties seems not difficult to state. It is clear that the aim of a moral combatant must be to disable his opponent, and force him to submission, but not to do him (1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief. Unfortunately, this second limitation is inevitably so vague as to leave room for great differences of opinion as to its proper application; and, moreover, its application must continually vary with variations in the arts of war, and in the circumstances and prevailing sentiments of civilised men. Fortunately, on the other hand, the restraints that at any time ought clearly to be imposed on a belligerent, in the application of this principle, are usually sustained by strong sanctions, at least when the area of the war is restricted;[1] from the danger that the

[1] An important incidental evil of a widely-extended war is, that the restraining force of public opinion on the belligerents is inevitably much reduced by it.

belligerent who violates them runs of rousing public indignation against himself in neutral communities, as well as hardening the resistance of his enemy.

Perhaps the best way of illustrating both the general principle above laid down, and the difficulties of defining its exact application, will be to sketch in outline the restraints to which a belligerent would be expected to conform, in his treatment of his enemy, according to existing opinion; drawing attention to any important points in which opinion has recently changed or is changing.

To begin with the instruments and methods of war. A belligerent may be expected to abstain from using weapons that inflict decidedly more suffering than others, without crippling the enemy at all in proportion,[1] and from devastation that does not importantly facilitate military operations. Generally speaking, he is allowed to deceive the enemy in any way he can; but he may not use as means of deceit the flags of truce, and other symbols that are needed for carrying on the necessary intercourse of enemies.

Again, he may be expected to abstain from recruiting his army compulsorily out of the population of an invaded country: since the modern sense of nationality would not only excite a strong reprobation for such conduct, but would also make the forced recruits a bad element of the army. On both these points there has been a considerable change since the now prohibited practice was largely carried on by the Prussians in Saxony in 1756; owing to the general growth of national sentiment that has taken place in the interval. A more important rule is that which—we may confidently hope—will in future restrain civilised belligerents

[1] In the Declaration of St. Petersburg, in 1868, the European powers laid down that it would be "contrary to the laws of humanity to employ arms which render death inevitable." I do not understand the principle on which this is laid down, since death is the most effectual kind of disablement; and if the process that made it inevitable also made dying more rapid, without making it more painful, the sufferings of a battlefield would be materially diminished. And international morality has never prohibited such wholesale destruction as is caused (*e.g.*) by mines in sieges.

from inflicting personal injury on non-combatants, so far as they submit; and even from imprisoning them, unless they are of special political importance—as sovereigns and diplomatic agents, or professionally employed in rendering services to combatants—as commissariat employés, messengers, etc. The effect of scaring the enemy into submission by harsh treatment of non-combatants is on the whole too uncertain and remote to outweigh (1) the danger of rousing the sympathetic indignation of neutrals, together with (2) the serious inconveniences to which an invading army is exposed in the midst of a population embittered by private injuries. Similarly, an invader may be restrained from interfering with the laws and customs and social life of any portion of the hostile country that he may temporarily occupy, so long as it submits: though it is difficult to put limits to the severity which he may legitimately use to crush resistance to his authority on the part of non-combatants.

Similarly, belligerents may be expected to abstain from inflicting personal injuries on combatants *hors de combat*: unless exceptionally by way of punishment for violating the usages of war.[1]

On the other hand, in order that combatants and non-combatants may claim their respective privileges, the adversary has a manifest right to demand that a clear line shall be drawn between the two; so that no individual may avail himself of the advantages of both characters at once. The difficulty here arises solely or mainly in the case of resistance to an invading army: it would be out of the question to lay down that citizens hitherto unwarlike may not rush to arms to defend their country in its extremity; but the invader may fairly claim that if they thus join the ranks of combatants, it shall be in some manner both orderly and unmistakable: —that is, under some responsible authority who can keep their hostile acts within the usages of war, and with some

[1] The slaughter of prisoners has also been justified as a measure of self-protection: but I conceive that it would now only be tolerated—however extreme the emergency—if the prisoners refused to give their parole not to serve during the remainder of the war, or if experience showed that their word could not be trusted.

distinctive irremovable marks of their newly assumed profession.

For similar reasons merchant vessels could not be allowed to assume a warlike character unless attacked. It used, indeed, to be the practice to allow "privateers"—*i.e.* ships sailing under a commission of war, but fitted out by private persons for private gain, to be made by preying on the enemy's commerce: but, owing to the difficulty of maintaining proper control over such armaments, it has been agreed by most civilised States[1] to abolish privateering.

In the treatment of combatants who have been taken prisoners, our general principle will require the captor to refrain from any rigour not necessary for safe custody, and to provide adequate food and clothing for the enemies kept in custody: and if, to recoup the expenses thus incurred, he must be allowed to make his captives work, it will prevent him imposing on them any work of a needlessly degrading kind, or directly connected with the war. A more onerous demand on the victor is that of succouring and tending the sick and wounded left behind by a flying enemy; but the common sentiment of the civilised world would now impose this as an imperative duty, which must be performed even at considerable inconvenience: and the same sentiment is probably now strong enough to secure neutrality not only for surgeons and medical attendants while employed in medical functions, but also for hospitals, ambulances, and hospital ships, with their surgical and medical stores.

To sum up; so far as personal injuries are concerned, there is, I think, no material difficulty in limiting the mischief caused by war to something like the *minimum* necessary to achieve the ends of war.

§ 3. Restraint is more difficult as regards seizure of property. The heavy pecuniary burdens that the conditions of modern warfare impose on a belligerent render most kinds of wealth

[1] A declaration to this effect, adopted at the Congress of Paris in 1856, has since been signed by all civilised States, except Spain, Mexico, and the United States.

—public or private—undeniably useful to him: property has no inconvenient patriotic sentiments that will be violated if it is made to serve the needs of the enemy, and common humanity is not offended by spoliation if mild and regular, as it is by the harsh treatment of innocent persons.

Still, certain limitations may be established: An invader must be allowed to seize the movable public property of the invaded country, and freely to use immovables for his own purposes: but he may be restrained from appropriating such things as archives or State papers, which are specially important to the country in which they are found, but not available for warlike uses on either side. Probably, too, the appropriation of collections of pictures or books may be prevented in future civilised warfare; since they could only be made available for warlike purposes by being sold and so most probably dispersed: and the loss thus entailed, not only to the spoliated country but to mankind at large, would generally be quite disproportionate to the belligerent's gain. On somewhat similar grounds a temporary conqueror may be restrained from diverting public revenues set permanently apart for such social purposes as healing, education, art, and science,—for which the government of the invaded country is practically only a trustee.

The most serious difficulty arises when we attempt, on our general principle, to fix the limit of an invader's right to take private property. The indiscriminate pillage that was considered legitimate until the eighteenth century, has gradually died out, "partly from an increase of humane feeling, partly from the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and their military operations embarrassed in countries of which the resources were destroyed"[1]—in fact "the suffering attending it was out of all proportion to the advantages gained by the belligerent employing it." But this would

[1] The passages quoted in this—as in the preceding—chapter are from Mr. W. E. Hall's treatise on *International Law*.

not be true of the orderly and regulated levying of supplies from private persons through "contributions" of money beyond ordinary taxes, and "requisitions" of special commodities needed by the army,—food and fodder, horses, waggons, boats, and certain kinds of labour. Such "requisitions" differ from regulated pillage mainly in the receipts which it is customary to give for them, which facilitate the recovery of compensation from their own government by the private persons. If such receipts are given, both "contributions" and "requisitions" may be regarded as payments on account, compulsorily made by private members of the invaded community, of a portion of the pecuniary compensation for the mischief of the war which the invader holds himself justified in asking from the community as a whole. So regarded, these contributions in money and kind conduce to the invader's main end in three ways: (1) they give him supplies of which he stands in need; (2) they diminish the power of his non-combative enemies to assist in the war against him in the one way in which, as non-combatants, they naturally would assist—by furnishing the "sinews of war";—and (3) at the same time, if imposed over a considerable district, they apply a strong pressure tending to indispose the enemy to continue hostilities: while yet, unless the contributions are excessive in amount, so great as to cause severe distress, the pressure cannot be called cruel.

I therefore think that, on our general principles, the belligerent cannot reasonably be restrained from enforcing such contributions; and in fact they were enforced, with the full severity that I regard as admissible, by the invaders in the last European war.

If, then, an invader who gets a portion of his enemy's territory under his control may exact contributions from his enemy in money and kind, it would be unreasonable to require a maritime power to abstain altogether from attacking the private property of enemies at sea: though it may reasonably be required to abstain from such attacks where they would inflict hardships out of proportion to their utility to the belligerent. The seizure of coast fishing-boats is a

case of this latter kind, except where such boats are specially useful for military purposes.

§ 4. Let us pass to consider the rules by which the relations of belligerents to neutrals are to be regulated. The main difficulty here arises from the necessity of applying together two principles, each of which seems clearly acceptable if considered by itself, but which, when applied, come inevitably into a conflict that can only be settled by a more or less arbitrary compromise. It is clearly the duty of a belligerent to avoid injuring communities that are not at enmity with him, and their members; and it is clearly the duty of a neutral not to assist either belligerent in his warlike operations. And some deductions from either principle are obvious and uncontradicted. Thus, on the one hand, it is plainly the duty of a belligerent not to send his forces into the territory of a neutral government without the consent of the latter—however convenient he may find this for the purposes of his military operations,—and not to interfere with any members of neutral states whom he finds outside their countries, unless they are aiding his enemy. And, on the other hand, it is the duty of a neutral state to prohibit its subjects from engaging personally in the service of either belligerent, and to take measures to prevent their doing this to any material extent; and also to be impartial in either closing or opening its territory to both belligerents equally.[1]

But in realising this impartiality difficulties arise: since regulations that are *formally* impartial, and are applied with strict equality to both sides, may practically give a decided advantage to one of the two belligerents, owing to his situation and circumstances. This being so, the safer course for the neutral is to *refuse* to both belligerents any use of his territory that may facilitate warlike operations; and this is what existing opinion would regard as his duty, so far as the admission of organised forces into his territory is concerned.[2]

[1] It will generally be the neutral's interest to adopt the former of these alternatives, so far as the admission of armies is concerned; as the latter is more likely to bring it into collision with one or other of the belligerents.

[2] "During the eighteenth century it was an undisputed doctrine that a neutral state might grant a passage through its territory to a belligerent army";

But this rule can hardly be extended to the exclusion of ships of war from the territorial waters of a friendly state: since such ships may be in pressing need of provisions or coal, which they cannot otherwise obtain, and which, therefore, it would be inhumane not to allow them to purchase. On the other hand, it is obvious that, if the privilege of purchasing such supplies in neutral ports were granted without limit, the neutral territory might practically furnish the belligerent with a base of operations, enabling him to carry on naval war from which he would otherwise have been precluded. The neutral, therefore, has the delicate task of limiting the hospitality it extends to ships of war to the minimum that humanity—considering the inevitable conditions of navigation—may seem to require. Similarly, common humanity requires that a neutral state should extend hospitality to a beaten army flying towards its frontier; but it must not allow them to start from its country to resume hostilities: it would seem to be the neutral's duty to disarm and "intern" them, unless they accept the position of prisoners of war released on parole.

More serious difficulties arise out of the relations of trade which bind together modern States in time of peace to a continually increasing extent. For, on the one hand, any trade, even in things remote from warlike use, may actually contribute importantly to enable a belligerent to carry on his war: on the other hand, it would be a palpably exorbitant pretension in a belligerent to require all neutral States to put an end to their trade with his enemy. Only a Napoleon, at the giddy height of his predominance, could make such a claim;[1] and it is not likely to be repeated. Some compromise, then, is needed between the claim of the neutral to

but "the most recent authors express a contrary opinion," and "no direct attempt has been made since 1815 to take advantage of the asserted right."

[1] I refer to the famous "Berlin Decree" (1806), by which all nations were prohibited from all commerce or communication with the British Islands. But the retaliatory Orders in Council of the English Government (1807), proclaiming a blockade of France and the States under her sway, were scarcely less monstrous, except that they were retaliatory.

be undisturbed in his trade, and the claim of the belligerent that his enemy shall not be aided.

The best compromise seems to be that no private trade—except to some extent trade in the actual munitions of war—should be regarded as an offence on the part of the neutral State of which the trader is a member; but that the belligerent should have a right to check such trade, and confiscate the wares, in all cases in which they are calculated to be of special utility to his enemy,—either (1) from the nature of the commodities, considered in relation to the enemy's needs, or (2) from the fact that his own military operations are directed to the cutting off of all supplies from some part of the enemy's territory. In the former case the belligerent would be allowed to confiscate the commodities as "contraband of war"; in the latter he would confiscate them on the ground of an attempt to break through a "blockade." Under neither head can we theoretically determine with any precision what the extent of the belligerent's rights ought to be; and there is considerable dispute as to their extent as fixed by usage. Even the recent practice of European and American civilised States shows considerable variation, both in what they claim as belligerents and in what they allow as neutrals,—and the two standards do not always coincide in the case of the same state. Thus, it is not agreed whether horses are contraband, or ship timber, and other materials of naval construction, or coal sent directly for the use of war-ships, or provisions and clothing sent for the use of soldiers. So again, though it is agreed that a naval blockade must be maintained by forces at least sufficient to render egress or ingress dangerous to the ship attempting it, it is not agreed how far the danger should go. On both points it is much to be wished that as definite rules as possible—which must necessarily be to some extent arbitrary—should be arrived at by agreement among the leading States.

I have said that no trade should be regarded as an offence on the part of a State "except to some extent trade in the actual munitions of war." There is one special case in which

it certainly seems best, in the interests of peace, that this trade should be definitely prohibited; *i.e.* where the process of exporting munitions is easily perverted into the distinct violation of neutrality before noticed, which consists in allowing the neutral country to be used as a basis for military operations. The most important example of this is the trade in armed ships; since an armed ship sent forth as an article of export is so easily changed into a ship adequately equipped and manned for war, that a State which allows such export at the risk of the private exporter—like other contraband trade—will find it hard practically to prevent its country from being made the source of a hostile expedition.

In the above discussion I have said nothing of the formalities that should accompany the commencement of a war, —a point to which international jurists have given serious attention. I conceive that they have somewhat exaggerated its importance. It is no doubt desirable that any hostile act commencing a war should be preceded by a formal notice, and accompanied by a formal justification of the resort to violence; but it is more important that war should be really resorted to only when redress for wrong has been refused; and the process of asking for redress will involve a practical warning that war is impending in case of refusal.

§ 5. It remains to ask how far such regulations as I have sketched out are applicable to civil war. Let us consider first the relation between the belligerents—though it is not strictly an "external" relation. It is clear that the reasons above given for limiting the mischief of war in various ways, so far as it falls on combatants, apply equally where the war is between two parts of the same community, except in the one case of the treatment of prisoners. In this case the rule that restricts a belligerent's right over his captives, to that of detention for the purpose of disablement during the war, comes into conflict with the right of a government to treat rebels as criminals. It is admitted by all reasonable persons that it is the imperative duty of every government to punish wrongful violence directed against itself like other wrongful violence—and even with peculiar severity, on

account of the widespread evils resulting from anarchy: and so long as other States are not prepared to intervene in a hostile way, they must allow a government contending against an insurrection to assume itself to be in the right, and therefore to treat the insurgents as criminals. The only question therefore is, whether the mere extent and strength of an insurrection may render it the duty of the government contending against it to accord to captive rebels the privilege of prisoners of war? I should be disposed to give an affirmative answer to this question; chiefly on the ground that the mere strength and extent of an insurrection must, generally speaking, be taken to show that a large number of persons regard it as justifiable; and, considering the variation and uncertainty of human judgments on questions of political justice, this widespread opinion is reasonably held to reduce very materially the culpability of individuals. Strong considerations of expediency — the danger of provoking reprisals, and of causing bitterness that would long outlive the war—tend to the same conclusion; and probably even the leaders of an insurrection that attained the dignity of a civil war would not now suffer any penalty beyond banishment and loss of property, at the hands of most modern governments.

No general rule, however, can be laid down for determining exactly when a government is wrong in refusing to captive insurgents the full rights of prisoners of war. It is somewhat easier to define the point at which they are entitled to the privileges of belligerents at the hands of neutrals; since in this latter case the question is simply one of military fact, and as such it is not unlikely to be implicitly decided by the established government of the divided community, before neutrals have occasion to consider it. For if this government claims the right to take any war-measure injuriously affecting the interests of neutrals—such as blockading ports or capturing contraband of war—it cannot reasonably complain that the insurgents, whom it has thus by implication declared to be belligerents, should be recognised as such by other States. It is, indeed, possible that the government, to

avoid this implication, may try to throw what is substantially a war-measure into a non-warlike form; for instance, instead of proclaiming the blockade of certain ports, it may simply declare them closed against trade. Such a measure would, on the principle applied in the preceding chapter, be within the strict international right of the government adopting it in time of peace, though it would be unfriendly unless justified by grave emergency; but if it were adopted in time of civil war, it would force neutrals to examine whether the ports in question were *de facto* under the control of the government claiming to close them; and if they were actually in the hands of the insurgents, the measure would justify neutrals in recognising the latter as belligerents, no less than if it had been openly a proclamation of blockade.

§ 6. In considering such rules of international duty, applicable to the conditions of war, as seem capable of being effectively maintained by the *consensus* of civilised communities, I have—as was before explained—left out of consideration the *justice* of the war on either side. But can we do this completely when we pass to consider the validity of the results of victory in war? Can we regard as finally and permanently binding an arrangement to which a community is forced to agree by the pressure of superior force exercised throughout in an unjust cause? I do not think that an affirmative answer to this question would be supported by general moral opinion; nor do I think that it would conduce to the general happiness of civilised mankind that such a rule should be so supported: the prospect it would hold out of securely enjoying the gains of a skilfully timed act of unscrupulous brigandage would be too strong a temptation for statesmen and States. On the other hand, —as was before said—to treat unjust force as altogether invalidating obligations deliberately assumed by States under its pressure would obviously tend to aggravate the evils of unjust victory, as the unjust victor, being unable to rely on the promises of the vanquished community, would feel driven by self-interest to crush it utterly.

Between these dangers we have to take refuge in a somewhat rough compromise, allowing a certain jural force to treaty obligations imposed by unjust victors, but not the same as if they were free from the taint of injustice: and this view must be extended to conditions imposed by just victory, when they are clearly in excess of what is required for due redress and reasonable security for the future. At the same time, it has to be admitted that owing to the difficulty of obtaining either a clear *consensus* as to the justice of a war, or an accepted definition of "due reparation" and "reasonable security," the effect of this compromise inevitably tends to weaken generally the moral sanction attaching to obligations imposed as the result of war.

To get a clearer view of this compromise—which I conceive to be accepted by current opinion—it is convenient to distinguish two main species of victor's conditions: (1) cessions[1] of territory that—though usually defined and formally admitted in a treaty—may sometimes be realised without any express contract at all, simply by the tacit recognition of the changes of dominion brought about by military force; and (2) contracts in the narrower sense—*i.e.* engagements on the part of the vanquished community, to be fulfilled at some future time. Where victory in war has led to a transfer of territory, the question of fidelity to engagements seems to me only of secondary importance: the most important question relates to the moral or jural situation that results from complete—though possibly tacit—acquiescence in the loss of territory. In short, we here come upon the question of the "Right of Conquest" reserved in a previous chapter (xiv). In considering this question, a broad distinction has to be drawn between territory whose inhabitants really formed one nation with the community from which the treaty has cut them off, and territory that was merely under the dominion of the vanquished State, but not inhabited by persons having any

[1] Such cessions are, of course, "contracts" in the wider sense in which the term includes transfers of property between individuals; but not in the narrower and more usual sense.

strong preference for the government that they obeyed. In the former case the cession involves the dismemberment of the vanquished nation, unless the whole portion of it occupying the ceded territory is willing to submit to the sacrifice of quitting its native soil. The imposition of these alternatives seems an excessive punishment,—except for very outrageous or frequently repeated international crimes; accordingly, I conceive that a nation subjected to such a punishment would ordinarily incur no moral condemnation for an attempt to recover its ceded territory, in spite of any treaty of cession, so soon as any change in the political situation gave a reasonable prospect of success in such an attempt. At the same time, I think that the existence of such a treaty would materially strengthen the moral position of the conqueror, in case the war should be renewed, even if the original conquest had been generally disapproved: and a similar effect, though less in degree, would result even from a mere tacit acquiescence in the conquest. To fight in defence of a conquest that had been expressly—or even only tacitly—ceded after a war of unjust aggression would at any rate not excite the same reprobation as the original aggression, and might even be approved by some who had condemned the original attack; and the same may be said of the infliction of a severer and more crushing penalty in case of success in the renewed war. In short, conquest, in the case supposed, seems actually to give rise to a jural situation as to which the opinions and sentiments of the civilised world are so divided and balanced that an appeal to force affords the only possible solution, so long as the old national sentiment of the inhabitants of the annexed territory continues undiminished.

I do not, however, think that this result can be accepted as theoretically satisfactory; although in practice I fear that there is ordinarily little hope of avoiding it, owing to the difficulty of obtaining a clear *consensus* either as to the justice—on the victor's side—of the war that resulted in the conquest, or as to the indispensability of the conquest for the victor's future security. Still, on the assumption

that the conquest is to be condemned, I think we ought to arrive at a more clear and decided view than seems now prevalent as to the validity of a formal cession of territory imposed by wrongful force: and I am of opinion that, in the case supposed, it ought not to be taken to bind the vanquished to more than a complete temporary suspension of hostilities, terminable at any time by the wronged State, under the same condition under which the rebellion of an admittedly oppressed section of a State would be generally judged to be legitimate:—*i.e.* if circumstances afforded a reasonable prospect of success. We must, at the same time, distinctly recognise that by this temporary submission of the vanquished—whether express or tacit—a new political order is initiated, which, though originally without a moral basis, may in time acquire such a basis, from a change in the sentiments of the inhabitants of the territory transferred: since it is always possible that through the effect of time and habit and mild government,—and perhaps the voluntary exile of those who feel the old patriotism most keenly,—the majority of the transferred population may cease to desire re-union to the State from which they were torn away. When this change has taken place, the moral effect of the unjust transfer must be regarded as obliterated: so that any attempt to recover the transferred territory becomes itself an aggression:—though, of course, there may be a long period during which the preponderant sentiment of the transferred population is doubtful, and the right and wrong of a war for the recovery of the lost territory is correspondingly obscure.

So far we have been considering the case of a partial transfer of territory, which still leaves the State from which it has been transferred in complete political independence. But it seems clear that the case of a complete forcible absorption of an independent civilised nation,[1] or its reduction to a dependent condition, is to be dealt with on the same principle. We may lay down that such conquest can

[1] I imply, by using the term "nation," that the State thus destroyed is not merely what has before been called "inorganic." Cf. *ante*, chap. xiv, § 4.

only be justified by extreme international misconduct, or very prolonged and dangerous internal disorder and anarchy in the State whose independent existence is thus destroyed; at any rate, if it is not indisputably and markedly less civilised than the States absorbing it. Hence, we should not ordinarily condemn rebellion—supposing a reasonable prospect of success—on the part of any such conquered nation, whatever formal submission it had made to its conquerors, so long as the old national sentiment remained predominant: but in proportion as the old patriotism had diminished in intensity or range of diffusion, the disturbance of the established order would seem to lose its justification.

It is on these principles, I conceive, that an attempt to restore Poland, or to recover Alsace and Lorraine for France, would now be judged in the court of public opinion.

The case is different if the inhabitants of the territory ceded were at the time of the transfer not really united in national sentiment to the rest of the State from which they are transferred. Even if such cession had been caused by war recognised as clearly unjust, I do not think that the vanquished State would be held justified in recommencing the war merely in order to recover its dominion over an alien people whose territory it had formally ceded. I conceive, indeed, that the common opinion of civilised mankind rightly approves or tolerates this kind of alien rule when it is thought to have the good effect of extending what is believed to be a higher civilisation among the people ruled; but the disadvantage to the latter of a violent change in its rulers is so great and manifest, that even if a change of rule has been brought about unjustly—as between the dispossessed and the dispossessing governments—it would be generally better that the result should remain undisturbed, so long as the new rule was not materially inferior to the old. On the other hand, if the dominion transferred by war is dominion over an unwilling people equal in civilisation to the foreigners who rule it, I do not think that either the right of the older government to recover its alien subjects, or the right of the victor to keep them, would

have—or ought to have—any important support in the common moral sentiment of the civilised world; only the State that was at any particular time the aggressor would be liable to a certain disapproval as an inconvenient disturber of international peace.

I turn now to the case of international contracts in the narrower sense, imposed as a result of war. Here we have especially to deal with tributes and with engagements, diminishing the independence or restricting the military force: such as engagement not to fortify certain towns, or not to keep soldiers or ships of war beyond a certain fixed number or in certain places. I conceive that any contract of this kind that seriously impaired the strength or wellbeing of the State forced to make it would not practically be held by common moral opinion to be permanently binding, unless the war that led to the dictation of the contract was regarded as manifestly just on the victor's side and the contract itself necessary to his security: though it would be held to be strictly binding for a time. The limit of the duration of its practical validity cannot, of course, be definitely fixed; but it would seem to depend not so much on the mere lapse of time as on the amount of political change that has intervened; and also partly on the recognised oppressiveness of the condition that it is desired to repudiate. This is the best account I can give of current opinion on this perplexing question; and I do not see that any more satisfactory solution of it is available, so long as the method of settling international disputes by war has to be retained.

I have now to observe that the difficulties with which I have been dealing would be met by many writers on "International Law," by introducing the distinction between "law" and "morality." Legally, it would be said, every contract for perpetuity must be held to be permanently binding, unless it pledges to illegal or immoral conduct, or unless "anything which formed an implied condition of its obligatory force is materially changed"[1]—as, for instance, if the other party violates stipulations of the treaty or other

[1] Hall, p. 321.

rights of the State in question—but it would be vaguely admitted that a nation would sometimes be *morally* excused for a breach of its legal obligations. It becomes, therefore, important to consider the precise meaning and value of this antithesis of "legal" and "moral" in international relations —a fundamental question which it has seemed best to reserve for a separate chapter.

# CHAPTER XVII

## INTERNATIONAL LAW AND MORALITY

§ 1. In the two preceding chapters I have been mainly engaged in working out in a summary form the chief subordinate rules in which the general principle of mutual non-interference may most fitly be realised, in its application to the existing circumstances of civilised States. In so doing, I have found it convenient to refer largely to the received rules and customary practices of States in their external relations, as the best way of giving definiteness to general maxims which a merely abstract consideration of the subject inevitably leaves somewhat vague.

In the function of the expositor of international law as commonly recognised, the relation of the two parts of the procedure just described—deduction from principles and ascertainment of accepted rules and usages—is inverted. The expositor of international law is primarily concerned with ascertainment of the rules of international behaviour, that can fairly be said to be received or "established"—or, at least, of such of these rules as can claim to be "laws." He has only to refer to principles when he finds doubt and disagreement as to what rule actually is established, or when a novel case has to be discussed to which the established rules are not clearly applicable.

The importance of both elements of this work—the ascertainment of usage by reference either to the conduct of nations or to clauses in treaties and admissions in argument, and the correction of usage by reference to principles—seems

to me undeniable; I cannot doubt that, without it, the moral opinion and sentiment of civilised mankind, and their consciousness of their common interest in the maintenance of international peace and order, would be even less effective than they now are in checking reckless encroachments and violent retaliations, and promoting a peaceful solution of minor collisions of interest among States. It may, however, be reasonably doubted whether any system of rules thus worked out is properly to be called "law": and, in fact, the propriety of this appellation has been emphatically denied in England by Austin and his followers, who consider that it ought rather to be called "positive international morality." The suggested term can easily be shown to be unsuitable: but I think that it is instructive to discuss the grounds on which its adoption is urged. For we shall find that the system of rules commonly called "international law," while it differs importantly both from the positive law of a modern State and from its positive morality, may be usefully compared to both, being more like the former in some points and the latter in others: and that we tend to gain a clearer conception of it by observing the points of likeness and difference in either comparison.

In making these observations it will be convenient to recall the relations between Law and Positive Morality as examined in Chapter xiii. I there pointed out the importance of comparing these two systems of rules, both (1) in respect of the motives by which conformity to them is sought to be secured, and (2) in respect of their intelligible qualities, precision, and systematic coherence. Let us take the former point of comparison first, and ask how far the *sanctions* of so-called International Law—the penalties attached to its violation—resemble the sanctions of the positive law established within a State, and how far they resemble the sanctions of positive morality. We can see at a glance that they resemble both legal and moral sanctions in important ways: the former in their possible intensity, the physical violence that they may include; and the latter in the indefiniteness

of their source and the uncertainty of their infliction. It is doubtful what States will express disapproval of any breach of a recognised international rule, and whether any State will inflict any further penalty beyond expression of disapproval: but if any State does pass from words to deeds, it is likely to proceed to that extreme of physical violence which we call war.

In considering war, however, as the ultimate sanction of international rules, we are met by the distinction taken in Chapter xv. between rules of strict international duty, to the performance of which a State may rightly be compelled by force, and rules of international courtesy or comity, the breach of which justifies — generally speaking — moral disapprobation and complaint, but does not justify the use of violence. This distinction corresponds broadly to the distinction between legal and merely moral obligations in the sphere of civil conduct: and I conceive that it is generally accepted in practical as well as theoretical discussion of international relations. For instance, to take a case of current interest, I suppose that most American politicians hold that Canada ought not to hamper—as she has hampered—the free use of her fisheries by citizens of the United States: but I suppose most of them would admit that, according to the received rules of international law, she ought not to be compelled by threat of force to discontinue her restrictions;—or, to express it in the received phraseology, that her behaviour, though unfriendly, is not "illegal," and that the only "legal" mode of compelling her to alter it is by retaliatory acts of a similar kind—unfriendly, but not violations of strict right.

§ 2. This application of the distinction of "legal" and "moral" to international duties is, I think, convenient; and its convenience seems a sufficient reason for retaining the old term "international law," with proper explanations. At the same time, if we retain it we can hardly find the decisive criterion for applying the distinction in the difference of the *sanctions* effectively attached to the two kinds of rules respectively; since we must admit that civilised States have

often made, and more often threatened, war to compel other States to acts or abstinences which have not been imposed on the latter by the generally accepted rules of international law: and in many cases it cannot be said that the coercion that they have exercised in such cases has met with general disapproval. For instance, it seems to have been generally held in the last century in Europe that a State may reasonably and properly go to war merely to prevent a formidable aggrandisement of a neighbour and maintain the "balance of power"; but it has never been a recognised rule of international law that a State may not grow so strong as to alarm its neighbours. So again, in more recent times, wars to liberate "oppressed nationalities," or to promote the union into one State of divided groups of persons having a common nationality, have been widely approved; though it has certainly never been held to be a rule of strict international duty that a government should grant independence to any portion of its subjects who dislike its rule, if they belong to a different nationality from the rest. In short, if we consider the practice of modern States, we have to recognise that, besides the violent coercion exercised by States on each other in consequence of an alleged violation of international law, coercion no less violent has been commonly exercised without such justification, yet not generally disapproved; and therefore that we cannot effectively distinguish the rules of international behaviour that are to be called law by the sanction actually attached to them. If we keep close to actual facts, we can only define international law as a system of rules to which it is generally held that States, under ordinary circumstances, not only ought to conform, but may legitimately be compelled to conform; and which will accordingly be applied, in deciding disputes between States, by duly qualified arbitrators:[1] while we, at the same time, admit that circumstances are liable to arise under which a State will not be widely disapproved for overriding these rules, on the ground either of some imperative national

[1] That is, unless the States that refer the dispute to arbitration expressly agree upon any other rules.

interest or some alleged higher principle of international morality.

That this is an unsatisfactory state of things is clear: and so long as it continues we cannot but expect—as was before said—that the most important issues between States will not be settled by arbitration. It may perhaps be said that at least in the case of a conflict between the supposed interest of any particular State and the received rules of international duty, the opinion of impartial persons ought to be clearly declared against the State in question: and that where it is not so declared, there must be a degradation of public morality in which no theoretical writer ought to acquiesce. And I agree that such a conflict is an evil which we ought to try to minimise: but I think that in laying down principles of conduct for which we desire to obtain effective general acceptance, it would be idle to ignore it or to hope to eliminate it altogether. Even in the private relations of individuals in a modern civilised State cases occasionally occur in which an individual is widely held excused for breaking a rule which it is yet thought desirable to maintain as law: and we must expect similar cases of approved or tolerated illegality to be more frequent in international relations, owing to the comparative fewness of the members of the society of civilised States, and the far greater importance of any one State relatively to the whole society.

I have been supposing a manifest conflict of national interest with recognised international right: but the cases are probably more common in which the promptings of the discordant interests of States would be mixed with or veiled by divergent views of imperfectly defined rights. Such mixture is necessarily promoted by the inevitably less perfect definition of international—as compared with ordinary civil—rights: owing partly to the absence of a common government in the society of nations, partly to the imperfect internal cohesion of many States, and partly to the great differences in the degree of civilisation attained by different human communities. For instance, the first of

these causes renders necessary and legitimate an extension of the right of self-defence which it is difficult precisely to limit. War must be admitted to be justified not only by actual aggression, real or alleged, but also by unmistakable manifestations of an aggressive design:—a nation unmistakably threatened can hardly be condemned for striking the first blow, if by so doing it gains an important advantage in self-defence. But this enlarged right of self-protection is easily extended to justify anticipation of a blow that is merely feared, not really threatened: and thus by gradual transitions we are led to a more or less plausible apology for hostile interference merely to prevent a formidable increase of strength on the part of a neighbour. I think that moral opinion should set itself steadily against this latter extension of the right of self-protection: still, it is obviously difficult to define exactly the degree of danger that would justify hostile action.

§ 3. In other cases it is not so much the claims of national interest admitted as semi-legitimate, but rather the development of international morality which comes into conflict with recognised international law. Thus (*e.g.*) the restriction of the right of conquest, which in the last chapter I took to be commonly accepted, is due to the increased recognition which the rights of nationalities have received in recent times;—a recognition that in other ways inconveniently clashes with the established political order of modern Europe. In considering this interference of gradually changing international morality with the established rules of strict international duty, we are led naturally to the second part of the comparison proposed at the outset of this chapter:—*i.e.* to the question whether the system of rules commonly recognised as International Law resembles Positive Law—within a State—or Positive Morality most, in respect of the elaborated precision, systematic coherence, and clear acceptance of its rules.

For it follows inevitably from the absence of any recognised regular organ with authority to settle disputed points, that in international relations the important distinction

between laws actually established and laws that a statesman or jurist may think ought to be established is not clear and unmistakable, nor the transition from the latter to the former abrupt and definite—as it is in the main in the sphere of civil law in a modern State. In any survey of social relations within any community, we are pretty sure to find a certain number of duties which it is recognised that men are not legally bound to fulfil, though there is a strong opinion that the legal obligation ought to be imposed. However much I may think that a man ought to be punished for mischief he has caused, and however decidedly public opinion may be on my side, still if he has not committed any act that has already been determined to be a crime either by precedent or by statute, the judge if really an expert will not condemn him to punishment: and if I try to supplement this defect in the legal system by private violence, the judge will condemn me. This distinction was not apprehended with perfect clearness, so long as the notion of a Law of Nature, having a validity prior to and independent of positive law, had a leading place among jural conceptions: but since it has come to be recognised that the proper source of new law is a special legislative organ distinct from the judicature, it is clearly seen that there are two distinct species or grades of "what ought to be," in respect of legal coercion:—there are rules which the judge actually ought to enforce by punishing their violation, and there are other rules which it ought to be his duty to enforce, but is not.

In the case, however, of positive morality a similar distinction obviously cannot be applied without qualification: since moral rules that men generally think ought to be accepted as actually binding must *ipso facto* be accepted: it is this general thought which constitutes their acceptance. Further, though careful reflection will enable a man to distinguish between the generally accepted moral rules of his own age and country and the rules that the reflective individual thinks ought to be accepted, still the distinction is obscure and vague to most minds as regards their own

morality here and now,—though sufficiently clear as regards morality in past ages or in China. If a "plain honest man" feels himself disposed to condemn any conduct, he is apt to think that all plain honest men must equally condemn it, if the circumstances of the case were clearly brought before them; hence it is his habit to express his personal condemnation in the name of common sense: he does not habitually recognise as possible a definite divergence between his own view of what ought to be and the positive morality of his age and country, unless such possibility has been brought home to him by some exceptionally sharp and public collision between the two. And, generally speaking, when such a conflict of opinions is disclosed on a moral question, there is really some doubt as to what rule is generally accepted, or whether any can be said to be so: a dissident individual rarely stands alone, and it is uncertain (1) what majority constitutes general acceptance, and (2) whether there is such a majority in any particular case of controversy. Again, in judging of any moral claim made by an individual or a class upon other individuals or classes, the divergence between the customary actions of men and their customary judgments of the actions of others introduces a further doubt as to the standard that ought to be applied: and the previous conduct of the particular claimant becomes an important consideration; since a man would not ordinarily be held justified in claiming from another a service that he had himself refused in a similar case.

In all these respects it must, I think, be admitted that what I have agreed to call International Law—the rules prescribing the duties which States may properly be compelled to perform—bears a closer resemblance to the *moral* than to the *legal* system of rules governing civil relations. Even in the processes of thought of many international jurists the distinction between what is and what ought to be an established rule seems to be obscure and imperfect. Both in theoretical discussions on international duty and in the practical debates on such questions between States, there appears a strong indisposition to recognise that a rule which

seems to the disputant right is not an accepted rule. Hence it is a common experience that treaties which profess to be merely declaratory of international law as it is, palpably go beyond a mere statement of the rules hitherto accepted; under the form of mere exposition they really aim at innovation: and the procedure is partly justified, because, owing to the absence of any regular legislative authority, the transitions by which prevalent opinions as to what international law ought to be pass into recognised rules of international law as it is, cannot, generally speaking, be made perfectly clear and definite. Changes must from time to time take place in the generally accepted views as to the strict international duties and rights of States: and when any such change is taking place, it must be expected that there will be differences of opinion both as to what constitutes general acceptance, and whether this exists in any particular case: and that these differences will be expressed in assertions by each disputant that the established rule is what he thinks it ought to be.

§ 4. There are, however, considerations on the other side, leading us to assign to international law, in respect of the normal process of changing it, an intermediate position between ordinary law and ordinary morality, as they exist in a modern State. Changes in ordinary law are, as we have seen, mainly introduced in modern States by the formal agreement of the persons and bodies that compose the supreme legislature, acting collectively after debate. Changes in Positive Morality, on the other hand, can only be brought about gradually by the unconcerted agreement of a number of individuals, judging of others and acting towards them as individuals, in the exercise of their legal freedom of choice in social relations. Now in the case of international law, though there is no regular organ of legislative innovation, the concerted action of States, in the way of treaties and conventions, plays an important part in the introduction of changes, to which there is no counterpart in the development of positive morality. This is due chiefly to the limited numbers of the States among whom

the system of rules and usages that constitute modern international law is actually established: they are so few in all that the agreement of even a small group of them to adopt a new rule may be an important—in many cases even a decisive—step towards the general acceptance of this rule.

The degree of influence which such a treaty or convention will have will no doubt be very different in different cases. It will depend partly on the more or less aggressive character of the agreement: *i.e.* it will be most intense if the concerting States agree not merely to adopt a new rule as governing their own mutual relations, but also to treat the non-observance of this rule by any other State as a breach of international duty: since, in this latter case, they attach a sanction to the rule which tends to make it practically obligatory on others than the contracting parties. The concerting States are not indeed likely to go as far as this in enforcing an avowed innovation in usage, unless the combination feels itself to have overwhelming force: but even if the new rule is understood to be only applicable to States who voluntarily accepted, still, the adhesion of a powerful group of States may partly express, partly cause, a consensus of opinion to which even nations who do not share it may find it convenient to yield. In this way the innovation may gradually come to be incorporated in the generally accepted system of rules.

Further, the concerted action of which I have been speaking is not the only method by which the rules of international law have been modified; it is undeniable that international law, like civil law, has been gradually made more definite and coherent by a series of arguments of the ordinary legal kind, terminated in some cases by judicial or quasi-judicial decisions; and it is conceivable that this process might be continued until international law should reach something like the systematic precision which parts of our own common law have attained through judicial interpretation alone. It would seem, however, that this process has been applied — and can be expected to be

applied—to international law only to a very limited extent, and in relation to certain classes of questions. It has been most operative in that part of the rules governing the relations of belligerents and neutrals which apply primarily to the conduct and treatment of individual members of neutral States; especially the rules relating to blockade and contraband of war, which are applied by the prize-courts of each belligerent State to determine the legitimacy of captures of the ship or other property of neutrals. The force that causes the decision of such a court to take effect is no doubt primarily the organised physical force of the belligerent State to which the Court belongs: but if we consider the intellectual process by which the decision is arrived at, it is plain that the rules applied are not conceived as laws formed by each nation for itself: they are conceived as rules whose validity depends on their general acceptance by civilised nations, and on the reasoning by which doubtful points in their definition on determined precedents, drawn from the practice of other nations, are allowed due weight. No doubt the prize-courts of each belligerent have a certain tendency to define and interpret the international rules in question in the interest of their own country; but this tendency has been kept in check, partly by the judicial habits of mind of the persons with whom the decision has rested, partly by the unimportance to the belligerent community of the gain to be made by encroaching on a neutral's rights, as compared with the danger of provoking the neutral's hostility in the crisis of war.

So again, when questions arise as to alleged wrongs received by individuals from foreign States, even when they are argued between diplomatists and not before judges, the discussion is still quasi-legal in method, and the decision is usually assumed to be arrived at by reference to international precedents and principles having international acceptance. And the same may be said of other disputes between States on points of minor importance: *e.g.* as to the national character of particular persons; as to the treatment of aliens

by the State in which they are residing—whether this is complained of as too unfavourable, or, in the case of political fugitives, as too favourable;—as to the rights and duties of ships in territorial waters; the privileges of ambassadors; and similar matters. Finally, in the case of all questions submitted to arbitration, the point at issue is practically determined by experts selected for their competence as lawyers, who are supposed to employ—and usually do employ—the same careful and impartial comparison of rules and precedents as is proper in determining a point of civil law. In these various ways a body of definite rules of international conduct has gradually been formed, which certainly bears, regarded as an intelligible system, a closer resemblance to the positive law than it does to the positive morality of a modern State.

It does not however appear that, on the most important questions that lead to disputes between States, the currently accepted principles for judging of international rights and wrongs have as yet been brought to legal precision and systematic coherence, in the manner above described: and it seems to me too sanguine to hope that they ever will be so brought, so long as States retain their independence, unless the moral and intellectual nature of the average human beings composing these States undergoes a radical change. Consider, for example, either the limits of the right of national self-defence against anticipated danger, noticed in a previous section; or the legitimacy of intervention, whether in the interest of the intervening State, or of the State interfered with; or the extent of the right of conquest, or of the right of renewing war to obliterate the effects of conquest;—it is difficult to conceive how any of the current doubts and disagreements on these fundamental points could be cleared up by any improved definitions of such rules as judges and arbitrators could apply. And I conceive that it will be found very difficult to regulate satisfactorily, in this quasi-legal way, the process of expansion into territory not yet occupied by civilised nations, of which I am to speak in the next

chapter. The decision on such points as these must—for a long time to come at any rate—be left to international morality, in the sense in which it is distinguished from law: and this may be given as a final reason for not sharing the hopes of certain optimists who look forward to getting rid of wars between States by increasing the use of arbitration. But though arbitration cannot bring in the reign of universal peace, it may, I conceive, diminish the occasions of war to an extent that should not be despised; and whatever can be done to increase the confidence of civilised States in this method of settling minor disputes, is, in my view, a valuable contribution to the welfare of civilised humanity. And it is chiefly for this practical purpose that I am anxious to retain the distinction between "international law" and "international morality"; using the former term to denote a system of rules, which experts called on to arbitrate between nations should apply impartially to such cases as may be brought before them, using a method as analogous as possible to that of ordinary law-courts. I conceive that the discussion of jurists, if duly aided by conventions among States, may succeed in rendering this system somewhat more precise and consistent, and that their efforts ought to be directed to this end: although, after all, the rules thus formulated can only have a limited range and efficacy in governing the relations of States: and the difficult task of judging of the deepest issues on which the conflicts of nations have hitherto turned must always be left to the vaguer and more disputed set of principles that we must distinguish as belonging to international morality.

## CHAPTER XVIII

### PRINCIPLES OF EXTERNAL POLICY

§ 1. In the three preceding chapters we have been considering the rules of international duty that should be maintained, by common opinion—and as far as possible applied in arbitration between States—in the interest of humanity at large. We have seen reason to adopt, at any rate as regards the relations of civilised and well-ordered States, a system analogous to what, in dealing with civil relations, is called Individualism, of which the fundamental rules prescribe avoidance of injury to person and property and enforcement of contracts; and we have examined the modifications of these rules, rendered necessary by the essential differences between States and individuals,—especially by the enlargement of the right and duty of self-protection, consequent on the want of a common government in the society of States. In the present chapter I propose to contemplate international matters from a somewhat different point of view, and to consider the principles and aims by which the action of any particular government should be determined in dealing with the external relations of its State.

Here the most fundamental question is whether a government should take as the ultimate end and criterion of right conduct, in dealing with communities and individuals outside it, the interest or happiness of all the persons concerned, or merely the interest of the particular group of human beings which it governs and represents and their posterity,—including any aliens voluntarily admitted to the

privileges of membership. I am not prepared to maintain that the two criteria will always practically coincide, and in case of conflict I cannot hesitate to prefer the former; to prefer the latter would appear to me deliberate immorality. At the same time, I think it important not to exaggerate the divergence between the private interest of any particular State and the general interest of the community of nations. I conceive that it will be usually the interest of any particular State to conform to what we have laid down as the rules of international duty, so long as it has a reasonable expectation of similar conformity on the part of its neighbours,—at any rate in dealing with civilised, coherent, and well-ordered States, in whose case conquest could not be justified in the interest of the conquered State as a means of getting rid of the evils of disorder, or in the interest of humanity at large as a means of substituting a higher civilisation for a lower. And so far as the past conduct of any foreign State shows that reciprocal fulfilment of international duty cannot reasonably be expected from it, any State that may have to deal with it must, I conceive, be allowed in the interests of humanity, the extension of the right of self-protection which its own interests would prompt it to claim. From any point of view, it must be held right for a State to anticipate an attack which it has reasonable grounds for regarding as imminent, to meet wiles with wiles, as well as force with force, and in extreme cases to stamp out incurable international brigandage even by the severe measure of annihilating the independent existence of the offending State. Indeed, I should hold that even the violation of the rights of an innocent neutral state may be justified in self-defence, if it is clear that its resources can and will be used for hostile attack by a high-handed aggressor.

Again, it seems to be plain that, in its own interest, no less than in that of humanity at large, a State should incur some risk of sacrifice in order to avoid war, by accepting arbitration on all points of minor importance, or negotiation if an impartial arbiter cannot be found; and that it should

make it a point of international policy to aim at improving the machinery of arbitration.

It is more difficult to give a general answer to the question whether it is the right policy to run the risk of war in order to prevent high-handed aggression by another state against a third. As we have seen, this cannot be imposed as a strict duty, on the principle that I have adopted. Still, where the assailant is clearly in the wrong, I think that any powerful neighbouring state—even if its own interests are not directly threatened—ought to manifest a general readiness to co-operate in forcible suppression of the wrong. Indeed, unless we suppose that the mere exercise of superior force is kept under some check by the fear of the intervention of other states against palpable injustice, war between states decidedly unequal in strength will hardly retain its moral character at all: to treat it, as I have done, as a sanction against the breach of international duty would be solemn trifling. And I think that co-operation to prevent wanton breaches of international peace is the best mode of preparing the way for the ultimate federation of civilised states, to which I look forward. But in the present stage of civilisation, it would, I think, be a mistake to try to prevent wars altogether in this way. We may hope to put down by it palpable and high-handed aggression, —including, perhaps, the refusal to submit minor points to arbitration;—but it is not applicable where there is a conflict of reasonable claims, too vague and doubtful to be clearly settled by general consent, and at the same time too serious to be submitted to arbitration. We may illustrate this by the present relations of France and Germany. I hold that the war of 1870-71 was substantially an aggression on the part of the French, prompted by a quite inadmissible claim of France to prevent, or obtain territorial compensation for, the alteration of the balance of power caused by the unification of Germany. I hold, therefore, that Germany, having repelled the aggression, had a right to take substantial guarantees against its repetition at the expense of France. At the same time, I think that the dismemberment actually

inflicted was a punishment in which no civilised nation can be expected to acquiesce, so long as the portion torn away retains a preponderant desire for reunion. Accordingly, if at the present time France took an opportunity for going to war with Germany for the recovery of Alsace and Lorraine, my sympathies would be on the side of France: at the same time, the claim of Germany to retain the provinces would seem to me so far defensible that I should not regard it as a clear duty of neighbouring states to interfere on either side.

However this important question of policy is to be determined, it will be admitted that, on one ground or another, war must be regarded as a constant danger, the preparation for which constitutes the most important part of those internal functions of government which, as was before noticed, are indissolubly connected with its external functions. But as to the extent and manner of such preparation I conceive that it is impossible to lay down any useful general rules: the policy of each State must be so largely determined by relations to its neighbours, which vary from State to State, and may be fundamentally changed from time to time. Thus, the policy of a relatively small State will reasonably differ from that of a relatively large one; the policy of an island from that of a country with continental neighbours; and so forth.

So again, no general rules can be laid down as regards alliances, beyond the statement before given of the strong grounds for supporting purely defensive leagues as the best substitute and preparation for a federation able to maintain peace among civilised States.

§ 2. So far I have been considering what should be done by a particular State for the maintenance of the system of restraints imposed on civilised States generally by the rules of international duty; but in an enunciation of the principles of external policy it is no less important to consider the relations that any State should aim at establishing with alien communities and territories, within the limits fixed by strict international obligations. Here the important questions are (I.) how far the government of a State should allow (*a*) free

trade—that is, trade only hampered by taxes imposed for the sole purpose of raising revenue—between its subjects and foreigners; and (*b*) free immigration of aliens into its territory: and (II.) how far it should aim at expansion of territory, and absorption of the foreign communities inhabiting the territories annexed.

I. A full discussion of the burning question of Free Trade I consider more suitable to a treatise on political economy. Here I will only say that the economic argument for Free Trade, considered from what I may call a cosmopolitan point of view, *i.e.* in relation to the interests of the aggregate of the States trading—is a simple application of the general argument for *laisser faire*, given in a previous chapter (x.). I regard it as broadly and generally true, though I think that a theoretical economist is bound to point out exceptional cases in which it fails; but I need not notice these here, because the consideration of them does not lead me to regard any interference with free trade as practically desirable from a cosmopolitan point of view. This conclusion indeed seems to be now accepted even in the countries in which the faith in the benefits of protection to native industry is most strongly held; since we do not find that in any of these countries protection to local industries is seriously advocated as a measure conducive to the economic interests of the whole nation. This is conspicuously illustrated by the case of the United States, in which, in spite of its strongly protective duties on foreign imports, no one—so far as I know—has ever proposed to interfere with the present unrestricted freedom of internal trade.

The question, however, is materially altered if we restrict our regard to the sectional interest of the group of persons inhabiting a particular portion of the whole region over which trade is carried on, supposing them to constitute an independent community. I cannot deny that it may, under certain conditions, be economically gainful to this group sometimes (1) to *resist* by import duties an industrial change which unrestricted free trade would cause, and sometimes

(2) to *promote* by similar means a change which would not otherwise take place. For, firstly, it is a matter of common experience—no less than a conclusion of general economic reasoning—that industrial improvements within a country may involve, as their natural consequence, a transfer of population and wealth from one part of the country to another. Suppose, for instance, that an improvement takes place in a certain manufacture in a district (A)—favoured by the special physical conditions of the district—which enables the manufacturers to cheapen their products so far that the manufacturers of similar wares in another district (B) cannot carry on their industry remuneratively. The natural result will be that the manufacture in question will gradually be abandoned in B; and probably some of the persons who would otherwise have been employed in it will migrate out of B, either to supply the growing demand for labour in A, or to seek some other employment which the improvement in question will indirectly provide; the remaining inhabitants of A will get the products in question cheaper, and thus the improvement will benefit all concerned. If now we suppose that districts A and B are in different States, when the manufacturers of the former obtain this decisive victory in industrial competition, then, if the products of A are freely admitted into B, either the transfer of population will still take place as above described, in which case the State containing A will gain in population and wealth at the expense of the State containing B; or, if it does not take place, owing to the dislike of the inhabitants of B to expatriation, it is conceivable that the persons who would have been transferred may be unable to find any employment in which their labour is as productive as it was in the manufacture which has been extinguished. In this latter case the freedom of trade which has deprived a portion of the inhabitants of B of the custom of their compatriots, will have been to the disadvantage of the community containing B as a whole, although it has benefited the consumers of the particular products newly imported.

Secondly, as J. S. Mill has argued[1]—it may in certain cases be economically gainful to a country to impose protective duties "temporarily, in hopes of naturalizing a foreign industry, in itself perfectly suitable to the circumstances of the country." Doubtless such a duty—if it is both needed and effective—imposes a tax on the consumers of the native product protected, but it is possible that the cost thus incurred may be compensated to the community through the ultimate economic advantage of producing at home a commodity previously imported; although the initial outlay that would be required to establish the industry without protection could not be expected to be ultimately remunerative to any private capitalist who undertook it. For the difficulties of introducing an industry may be such that, when once overcome by the original introducers, they would no longer exist for others in at all an equal degree; so that, as soon as the new industry begins to be profitable, competition would bring down prices so much, that though remunerative to the later competitors, they would not compensate the introducers of the industry for their initial outlay.

We cannot, therefore, lay down as certain, that interference with free trade can never be for the economic advantage of any one State in a group of mutually trading States; at the same time, I should hold that instances of this kind are likely to be practically rare. As regards the first of the cases above defined, I should hold that, in a large country, with a variety of employments and labour tolerably mobile, it is very unlikely that the gain obtained through free trade by the purchasers of imports will be more than balanced—as in the case above supposed—by the restriction of the field of employment for labour and capital within the country: it is far more likely that the persons thrown out of

[1] *Political Economy*, chap. x. § 1. Theoretically, we have to recognise that this argument may hold good from a cosmopolitan as well as from a national point of view; but practically, the cases in which protection would be expedient from a cosmopolitan point of view—supposing that it could be confined to such cases—are at any rate much rarer than those in which it would be expedient from a national point of view, on the same supposition.

employment can be employed somehow within the community in a manner more useful socially than if they were artificially protected in their old manufacture. As regards the second case—of temporary protection of naturally suitable industries—I should hold that the task of confining such protection within the limits within which it would be really advantageous to the community is too difficult and delicate to be successfully performed by actual governments: that such protection as actually applied is likely both to be too prolonged, and also to be used to foster weak industries that have no chance of living without artificial support; that, in short, any gain that may be derived from it in particular instances is likely to be outweighed by the indirect bad consequences of deviating from the broad and simple rule of free trade, and encouraging employers and labourers to look to State help instead of self-help in any difficulty caused by changes in industry and trade.

On the whole, therefore, I should hold that—apart from the military considerations of which I shall presently speak —the commercial policy of modern States should keep aloof from all attempts to protect native industry, even if each State has regard exclusively to its own economic interests; not because it is impossible that such protection, if judiciously introduced and limited, might not be occasionally advantageous to the protecting country, but because a really judicious protection of native industry implies a wisdom and strength on the part of government which we cannot practically expect to obtain.

It does not follow that a rigid adhesion to the rule of imposing import duties for revenue only is always expedient in the case of a country surrounded—as England is now —by neighbours more or less protectionist. Retaliatory import duties are essentially different from protective duties in their primary aim and justification: although they may often have protective *effects*,—as, indeed, may be the case with duties imposed for revenue only. Such retaliatory duties, indeed, are not generally justifiable — as is often confusedly thought — on the ground that the "one-sided

free trade" which will take place if they are not imposed will be in itself disadvantageous. The mere fact that one country (A) endeavours to exclude the imports of another country (B) by protective duties does not make it directly the interest of B to prevent its members from importing the products of A; since it gives us no reason for thinking that such importation will be carried on unless it is, under existing circumstances, the most economic mode of supplying the needs of the inhabitants of B, and unless the products imported can be paid directly or indirectly by the products of the importing country. The real argument for meeting the foreigner's protective duties by retaliatory duties on his products is that such retaliation may often put the free trade country in a more favourable position for getting rid of the foreign protective duties by means of commercial treaties. How far this can ever be a sufficient reason for imposing import duties for other than revenue purposes is not, I think, a question to which a general theoretical answer is possible. So far I have taken only economic considerations into account, but these alone cannot be absolutely decisive in a political discussion of the question. We have to ask further whether the mutual dependence of nations, which tends to result from unrestricted free trade, is advantageous or the reverse. From a cosmopolitan point of view, the answer to this question seems to me altogether favourable to free trade. What has been contemptuously called the "bagman's millennium" of Cobden—the ideal of universal peace brought about by universal free trade—rests, I conceive, on a thoroughly rational basis. We may distinguish two ways in which free trade conduces to peace: (1) by interweaving the interests of industrial classes in different societies in so intimate and complex a way as to cause a strong aversion to the widespread disorganisation of industry that must result from war; and (2) by removing one special motive for war, which must be expected to influence the nations of Western Europe, even more strongly in the future than in the past, if they cling to their protective systems—the desire of obtaining

access to new markets and new supplies of the materials of manufacturing industry. Supposing general freedom of trade and immigration, there seems to be no reason why the process of national expansion—of which I shall presently speak—should not go on peacefully, without exciting national rivalries so keen and bitter as to cause war; since the colonies and conquests of any one nation would afford open markets—and partially[1] open fields of employment—to all other nations.

On the other hand, assuming that war is to come, it must be admitted to be a disadvantage to a State to be dependent on other States for the necessaries of existence or warfare; and that unrestricted free trade may conceivably place it in this state of dependence. Whether it would be wise to interfere with the natural course of trade in order to prevent this dependence must depend partly on the danger of war, partly on the probability that even in case of war a sufficient amount of trade might be kept open to supply the most imperative needs of the people or the army.

Hitherto I have spoken only of import duties, which are practically the most important restrictions on international trade that a modern State is likely to be urged to impose. Turning to export duties, it is easy to show that it may be economically advantageous to a particular country to impose them, if this country controls the whole, or the chief, supply of a particular commodity for which there is a keen foreign demand. But monopolies of this kind are rare and precarious: and an export duty has a dangerous tendency to stimulate efforts to find substitutes for the wares artificially raised in price by it; and consequently to end by inflicting commercial loss on the country imposing it. If, however, the commodity thus monopolised is useful for warlike purposes, the export duty may have a special expediency as tending to increase the relative military strength of the State.

[1] I say "partially," because the utmost freedom of immigration would still leave foreigners at a certain disadvantage in competing for employment in colonies with immigrants from the mother country.

§ 3. The question of free immigration has occupied a much smaller place in modern political discussion than the question of free trade: still, freedom of immigration is a recognised feature of the ideal which orthodox political economists have commonly formed of international relations. And it seems, as I have pointed out, to be implicitly assumed in the most general economic argument for free trade; since, in order that the advantages of complete freedom of exchange among nations may be fully realised, it is necessary that labour should move with perfect ease from country to country to meet the changes that are continually likely to occur in the industrial demand for it. On the other hand, we have seen [1] that the system of international rights, formed in the earlier period of modern European history on the principle of mutual non-interference, allows each state complete freedom in determining the positive relations into which it will enter with states and individuals outside it; and though theoretically I cannot concede to a state possessing large tracts of unoccupied land an absolute right of excluding alien elements, I have not proposed any limitation of this right in the case of civilised countries generally. The truth is, that when we consider how far the exercise of this right of exclusion is conducive to the real interest of the state exercising it, or of humanity at large, we come upon the most striking phase of the general conflict between the cosmopolitan and the national ideals of political organisation, which has more than once attracted our notice. According to the national ideal, the right and duty of each government is to promote the interests of a determinate group of human beings, bound together by the tie of a common nationality—with due regard to the rules restraining it from attacking or encroaching on other states—and to consider the expediency of admitting foreigners and their products solely from this point of view. According to the cosmopolitan ideal, its business is to maintain order over the particular territory that historical causes have appropriated to it, but not in any way to determine who is to inhabit

[1] Chap. XV.

this territory, or to restrict the enjoyment of its natural advantages to any particular portion of the human race.

The latter is perhaps the ideal of the future; but at present I must discard it as allowing too little for the national and patriotic sentiments which have in any case to be reckoned with as an actually powerful political force, and which I regard as, for several reasons, at present indispensable to social well-being. In the first place, we cannot yet hope to substitute for these sentiments, in sufficient diffusion and intensity, the wider sentiment connected with the conception of our common humanity; so that the casual aggregates that might result from perfectly unrestrained emigration would lack internal cohesion. Secondly, even supposing that the fellow-feeling now uniting members of the same nation were everywhere expanded to embrace humanity, we could not secure that efforts to raise the standard of living among the poorer classes should be made equally everywhere, and therefore to allow unrestricted emigration might defeat such efforts in any one country without correspondingly benefiting the region from which they came. Again, the governmental function of promoting moral and intellectual culture might be rendered hopelessly difficult by the continual inflowing streams of alien immigrants, with diverse moral habits and religious traditions. Similarly, the efficient working of the political institutions of different states presupposes certain characteristics in the human beings to whom they are applied; and a large intermixture of immigrants brought up under different institutions might inevitably introduce corruption and disorder into a previously well-ordered state.

I think, therefore, that it would not be really in the interest of humanity to impose upon civilised states generally, as an international duty, the free admission of immigrants; and that it would be a proper policy for any such state to place restrictions on immigration if ever it should threaten to take such dimensions as to interfere materially with the internal cohesion of a nation, or with the efforts of government to maintain an adequately high standard of life among

the members of the community generally—especially the poorer classes. Apart from these mischievous consequences, the free admission of aliens will generally be advantageous to the country admitting them; partly for reasons similar to those that render free trade generally expedient, as the recipient state is thus enabled to share the advantage of the special faculties and empirical arts in which other countries excel; partly as tending to the diffusion of mutual knowledge and sympathy among nations. Further, as I shall presently point out, over a large part of the earth's surface the union of diverse races under a common government seems to be an almost indispensable condition of economic progress and the spread of civilisation; in spite of the political and social difficulties and drawbacks that this combination entails.

II. § 4. Among civilised states a continual interchange of population goes on to a slight extent, which will be called immigration or emigration according to the point of view from which it is regarded. As between old fully-peopled states like those of Western Europe and civilised states like the American, with a large amount of unoccupied land, the transfer of population tends to be more extensive and one-sided; the old states—even when they are growing in numbers and wealth—send to the newer countries a considerable excess of both over what they receive. When, however, emigration takes place from civilised states into regions uninhabited by savage tribes—whose political organisation would hardly be held to justify the name of "states"—it is in modern times normally combined with extension of the territory of the State from which it takes place, and may be regarded as a process of Expansion of the community as a whole. Whether, and in what manner, it is desirable that this expansion should take place is the last of the chief questions of external policy which I reserved for the present chapter.

First, it is to be observed that the extension of the territory of states through conquest is almost always accompanied by some immigration of the old members of the

state into the new territory. But where the territory was already fully peopled by human beings the immigration is not likely to be considerable, unless the war has been unusually destructive, since there would be no room for the immigrants without such a violent invasion of the private rights of the old inhabitants as would excite strong resistance and general odium. Hence the enlargement of a state through conquest of this kind is hardly to be called expansion; and the larger whole that results from it is not, for some time at least, *organic*, being composed of parts not united by a common national sentiment. Where the conquerors and conquered are approximately equal in civilisation this result is likely to continue for an indefinite period; and, as the government of the conquerors is not likely to confer benefits on the conquered sufficient to compensate for the drawbacks of alien rule, such conquest seems to be generally, under ordinary circumstances, rightly disapproved by the morality of modern civilised nations.

The case is different when the conquered, though not uncivilised, are markedly inferior in civilisation to the conquerors. Here, if the war that led to the conquest can be justified by obstinate violation of international duty on the part of the conquered, the result would generally be regarded with toleration by impartial persons; and even, perhaps, with approval, if the government of the conquerors was shown by experience to be not designedly oppressive or unjust; since the benefits of completer internal peace and order, improved industry, enlarged opportunities of learning a better religion and a truer science, would be taken—and, on the whole, I think rightly taken—to compensate for the probable sacrifice of the interests of the conquered to those of the conquerors, whenever the two came into collision.

Whether such conquest is in the interest of the conquering nation—apart from the need of repressing and punishing a turbulent neighbour, which has often been the preponderant motive to wars that have terminated in conquests—is a question to which it is difficult to give a general answer. Both the disadvantages and the advantages vary much in

different cases. The disadvantages are (1) the bloodshed and cost of the fighting necessary to win and keep the conquest; (2) the increased difficulty of self-defence due to the diminished cohesion of the enlarged state; and (3) the stronger temptation that dominion based on conquest offers to the aggression of powerful neighbours. The chief material advantages aimed at in conquest are (1) the increase of strength for war,—due mainly to the mere increase in size and total resources, enabling the state to maintain larger armaments—and (2) increase of wealth for the conquering community. The former advantage may easily be more than outweighed by increased difficulty of defence if the conquest is distant or otherwise inconveniently situated,—*e.g.*, England is rather weakened than strengthened for formidable conflicts by her possession of India. The prospect, again, of increase of wealth varies very much in different cases: and it is to be observed that in modern times such gain is rarely even expected in the form of tribute to the public treasury, since it is recognised that such taxation as is possible without oppression can rarely even meet the expense entailed by the acquisition and maintenance—as well as the internal government—of the conquered country. Still substantial gains are likely to accrue to the conquering community regarded as an aggregate of individuals, through the enlarged opportunities for the private employment of capital, the salaries earned in governmental service, and especially, in the case of a commercial community, through the extended markets opened to trade. The importance of this last consideration is obviously much increased by the general adoption of the protectionist policy which at present finds favour with the majority of civilised states; but it would not be without importance even under a system of universal free trade; since the superior civilisation that the conquerors are supposed to introduce will tend to spread to some extent their special tastes in consumption, and a consequent preference for the products of the dominant community.

Besides these material advantages, there are legitimate sentimental satisfactions, derived from justifiable conquests,

which must be taken into account, though they are very difficult to weigh against the material sacrifices and risks. Such are the justifiable pride which the cultivated members of a civilised community feel in the beneficent exercise of dominion, and in the performance by their nation of the noble task of spreading the highest kind of civilisation; and a more intense though less elevated satisfaction —inseparable from patriotic sentiment—in the spread of the special type of civilisation distinctive of their nation, communicated through its language and literature, and through the tendency to catch its tastes and imitate its customs which its prolonged rule, especially if on the whole beneficent, is likely to cause in a continually increasing degree.

This latter result might be called a process of spiritual expansion, as distinct from the physical expansion which takes place when the conquered region is so thinly populated as to afford room for a considerable immigration of the conquerors.

§ 5. In the conquest of countries fully inhabited by a people on a par with their conquerors in civilisation, the aim of physical expansion can—for a modern state—hardly come in: and it cannot usually be more than a subordinate aim, even where the conquered are decidedly inferior in civilisation, if they have arrived at the state of settled agricultural occupation of the land that they inhabit. Still, if the conquered, though semi-civilised, are at a decidedly lower stage of economic development, and if their climate is not unsuited to the conquering race, the immigration of the latter may reach substantial proportions; so that the conquered country acquires in some degree the character of a colony. Thus in Algeria, during some sixty years of French rule, room has been found for nearly half a million Europeans, although at the time of the French conquest the land was already held in agricultural occupation by an Arab population; and a judicious writer[1] allows himself to imagine that in 1930 the European element in

[1] Leroy Beaulieu, *De la Colonisation chez les peuples modernes*, 3d edition, p. 337.

"French Africa" may amount to two millions, with an Arab element of six or seven millions largely "francisés." If this forecast should be fulfilled, probably no one would refuse to Algeria the name of a colony.

More commonly, however, we denote by the term colonisation the occupation by a civilised community of regions thinly inhabited by uncivilised tribes; in which, accordingly, even supposing the "aborigines" to be treated with equity and consideration, there is room for a new population of immigrants far exceeding the old in numbers. The rational motives to colonisation, in this narrower sense, are partly the same as those that prompt to the conquest of semi-civilised countries. There is the desire of the more profitable employment for capital, afforded in a special degree by the undeveloped resources of regions new to civilised men, and more safe—or generally believed to be more safe—in a colony than in a foreign country; again, a colony tends, even more decidedly than a conquest, to be a source of wealth to a commercial country, from the extension that it affords to trade; since capital taken to a new country, if it is not employed in producing commodities peculiar to this new region, or for the production of which it has special advantages, is naturally applied to the production of food and raw materials, to be exchanged for the manufactured products of the old country.[1] But a further most important motive to colonisation is supplied by the desire—whether of the labourers themselves or of statesmen on their behalf—to find a more remunerative field of employment for the surplus labour of the mother country. This motive, however, would hardly by itself lead any European nation to attempt the founding of a new colony, so long as the American States allow free immigration and have large tracts of unoccupied land available for settlers; in the present condition, therefore, of the modern world, this motive

[1] It should be observed that, to realise this advantage, the fiscal policy of the colony must be kept under the control of the mother country, in order that the former may not exclude the products of the latter by import duties designed to protect its own industries. See Chap. xxvii.

only prompts to colonisation as distinct from emigration when combined with patriotic desires for national growth and expansion, extension of national wealth and prestige, and even power in international struggles,—though it must be very doubtful how far this latter end is likely to be promoted by the founding of colonies. It is obvious that such patriotic sentiments must be offended when emigrants are absorbed in an alien State.[1]

§ 6. We have, therefore, in a theoretical discussion, to distinguish clearly and treat separately the questions of (1) emigration, and (2) colonisation: though practically the two questions are often mixed up in the discussion of the large schemes of state-directed colonisation which have been recently urged on the attention of statesmen in more than one European country.

In considering how far any scheme of emigration should be adopted, we must avoid the error into which untrained minds are liable to fall, of assuming that any increase in the number taken from a country by emigration would involve a corresponding diminution in its future popula-

[1] It is difficult to estimate the force of the desire for national expansion, —including the desire of cultivated minds to spread the special type of civilisation which they enjoy — as distinguished from the more primitive impulse to the amelioration of the emigrants' condition. The latter must be taken to be the stronger: still it is doubtless a source of real dissatisfaction to cultivated Germans that they continually see their emigrants absorbed by the United States, and have to face the prospect of the posterity of millions of Teutons inheriting with the English language the traditions of English instead of German thought and sentiment.

The position of Great Britain in relation to the United States is very peculiar; since, on the one hand, whether we consider Great Britain's industrial and commercial pre-eminence or her empire, one of the chief dangers that threatens her is from the rivalry and aggression of the United States; on the other hand, if we derive any satisfaction from the expansion of the English race, and of the English type of civilisation as communicated through its language, literature, and law, the prosperous growth of the community inhabiting the United States must be regarded as the most important means to this end—and perhaps more important than if the colony had remained in political connexion with England. If any existing language should ever become the one common language of civilised man it will probably be English: and the chief cause of this result will, if it should be brought about, probably be the growth and commercial pre-eminence of the United States.

tion. On the contrary, general reasoning and experience combine to show that emigration has a stimulating effect on population in a country that has long been settled: and that, accordingly, every increase in the number of emigrants tends to cause a certain subsequent increase, which would not otherwise have taken place, in the population of the country from which they emigrate. It is, indeed, an error on the opposite side to suppose that this increase will always be sufficient to compensate for the diminution caused by emigration, so that even the largest normal stream of emigration may be regarded as having finally no effect on the amount of the population of the country from which it flows: but experience seems to show that this error diverges less widely from truth than the former.

The truth, however, lies between these two opposite views. On the one hand, in a country such as the United States now is, with a supply of unoccupied land forming a continuous territory with the older settlements, the population in the old settlements is not likely to acquire the density that it has in a country like Great Britain: on the other hand, if the cost of the voyage to America or Australia were freely defrayed by the English Government, there can be no doubt that the aggregate of persons of English birth inhabiting the two countries taken together would increase at a considerably greater rate. Under ordinary circumstances, therefore, we must regard any systematic provision for emigration as partly tending to produce the increment of population for which it furnishes an outlet. Accordingly, state aid to emigration cannot be safely recommended as a relief for distress in "congested districts"—in which the population is too large for the field of employment within the district—except under the condition either (1) that the causes of the congestion are clearly temporary, or (2) that other measures be simultaneously taken to prevent their future operation. And in considering the wider question how far it is expedient for government to undertake any regular and permanent provision for emigration, we have first to determine how far the increase of

population that it will under ordinary circumstances inevitably cause—in the mother country and the colony taken together—is in itself desirable.

In the earlier chapters of this work no mention was made of increase of population as a subordinate end at which a statesman should aim, with a view to the promotion of the general happiness. Such increase used to be so regarded in pre-Malthusian days; but it would now be generally agreed that—emigration apart—a government that took measures for the direct purpose of adding to the population of a country as fully peopled as England or France, would be assuming too great and dangerous a responsibility: the demand that it should find work and wages, without the deterrent conditions of our present poor-relief, for the beings whose existence it had thus indirectly caused would be too obviously just to be long resisted. Indeed, since Malthus, an important group of thinkers have urged that measures should rather be taken tending to restrict the growth of the population: and it is difficult to avoid the conviction that at some future time the governments of civilised countries will have to face this problem, unless measures of this kind are spontaneously adopted by the governed. But in the present condition of the world I should disapprove of any such measures, as tending to check the expansion of civilised humanity; since I regard the increase of the amount of human life in the world, under its present conditions of existence in civilised countries, as a good and not an evil. An adequate discussion of the grounds for this view would be out of place here; but I think we must assume, for purposes of political reasoning, that an average human life, under any physical conditions under which the human species tends to be maintained, is *primâ facie* likely to contain a balance of happiness, and therefore to be *per se* desirable. I admit that the assumption becomes doubtful, so far as increase of numbers tends to be accompanied by increase of disease, or even of physical discomfort not involving disease;[1] but the burden of proof seems to me

[1] I do not think that the mere decrease of physical strength such as tends

to lie on those who assert that these tendencies operate to so considerable an extent as to outweigh the increment of general happiness due to increased numbers. If this proof is not forthcoming, the statesman may reasonably contemplate with satisfaction the growth of numbers that the progress of civilisation brings with it: though it should doubtless be his aim to improve, by a wider diffusion of the opportunities of culture, the quality of the happiness enjoyed by the increased numbers. Hence, I should regard as a benefit to humanity the stimulus to population which organised emigration and colonisation would tend to give—accompanied as it would be with a tendency to improve the average condition of the human beings in the colony and mother country taken together.

I do not, however, think that any of the West European States, loaded as they are with military expenditure, and the payment of interest on debts incurred through war, can be expected to undertake any considerable regular outlay for the promotion of emigration, unless this outlay brings in some substantial return to the state that undertakes it, otherwise than by relieving the pressure on population. And where the emigrants become members of another state, no adequate return to the state sending them out can generally be expected, unless the government of the region of immigration will guarantee the repayment of the outlay. Some advantage, indeed, is likely to result in the way of extended trade, since the emigrants will be more likely than foreigners to have tastes which the producers of their original country will be specially qualified to supply; but this advantage will be too uncertain and precarious to justify expenditure for which it is the main return. Under these circumstances I conceive that the intervention of the government of the region of emigration should ordinarily be limited to the collection and diffusion of information, the prevention of deception by emigration agents, the regulation of the service of emigrant ships, and other comparatively inexpensive measures;—designed to

to result from the increase of the manufacturing or trading element in a population necessarily involves a decrease of happiness.

secure as far as possible that emigrants shall go to the most suitable places, with full knowledge of the inconveniences and risks involved in the process of transfer, and that this process shall not take place under conditions unnecessarily dangerous to their physical wellbeing.

§ 7. The case is materially different when the question is of promoting emigration to territory—whether newly acquired or not—under the control of the government. In this case we must estimate more highly the advantage of extension of trade, and also of enlarged opportunities for the employment of private capital; there is also, as we saw, the sentimental satisfaction of the desire of national expansion; there is in some cases a gain of increased strength to the state,—though this, of course, depends on the situation of the territory colonised: and finally, there is a good prospect of recovering—even for the public treasury—a considerable portion of the expense of subventing emigration, from the value of the land and its contents in the newly settled region. This last element is of varying importance; but it may conceivably be so considerable as both to defray the extra expense thrown upon Government by the process of colonisation—including the cost of facilitating access to the land by roads, harbours, etc., as well as the cost of surveying it for sale or lease,—and also to contribute as large a part as Government ought to undertake of the cost of transporting emigrants. Experience, however, seems to show that, generally speaking, taking into account the risk of conflict with aborigines and of collisions with other civilised states, the cost of founding a colony will outweigh any returns obtainable to the public treasury of the mother country;[1] and that the extra cost cannot be thrown on the colonists, since, so long as the colony is weak, it is too poor to bear it, while, when it has grown richer, it will also have grown stronger, and will refuse to pay. Still, for the reasons before given, even

[1] Merivale (*Colonisation and Colonies*, sec. ix.) says that, "if history be consulted, it will be found that in modern times no experiment in colonisation has ever succeeded in the way and at the rate which its projectors have expected."

where colonisation is a bad investment from the point of view of public finance, it may still be remunerative in one way or another to the community as a whole.

In the present state of the world, the founding of a new colony, adapted to the reception of European immigrants on a large scale, is not a very probable event.[1] But the business of promoting the settlement of unoccupied land remains of some practical importance, though such land as is still available and suitable lies chiefly within the territories already under civilised government. I propose, therefore, briefly to consider the chief special functions that will devolve on Government in connection with this business; viz. (1) the disposal of the land available for settlement, (2) the encouragement (if required) of immigration, and (3) the management of the relations between the settlers and the aborigines. The two former functions, as we have already noticed, are closely connected, since it is the land available for settlement that will normally supply the chief resources for encouraging immigration. There are two essentially distinct modes of employing it in this way, each of which admits of several minor modifications; (*a*) it may be granted to settlers, under conditions formed to secure its cultivation, either without payment or for a payment below its market value; or (*b*) it may be sold or let at the market rate, and the proceeds used to defray the whole or a part of the cost of conveying suitable emigrants. Whether either of these methods should be adopted, and if so which method, will depend on several considerations, such as the distance of the region of immigration from the native home of the settlers whom it is designed to attract; the quality and extent of its natural resources, and the amount of labour and capital required to turn them to most profitable account and last, but not least, the probability of obtaining an adequate supply of immigrants without special encouragement.

i. Where the emigration into unoccupied districts is

[1] Merivale, in 1870, went so far as to say (*Fortnightly Review* for February 1870, p. 155) "emigration exists and multiplies: colonisation is dead and buried."

mainly continental—as in the United States—so that the new settlements are continuously connected by older ones with fully peopled territory, the method of directly contributing a part of the cost of transporting emigrants is obviously less needed, and would be difficult to apply in a regular way. In this case, if the returns from the land when sold or leased at the rate financially most profitable should be more than sufficient to pay the cost of accurate surveying and roadmaking, and any special expenses entailed by the relations with the aborigines, it would seem better to employ them in aiding the construction of railways or other elaborate instruments of communication, or else as a substitute for taxation. And this may also be best even where the region of immigration is separated by a long sea voyage from the region of emigration, if a sufficient supply of emigrants can be obtained without the special attraction of an artificially reduced cost of transport or settlement.

ii. If such special attraction is thought to be required to quicken and amplify the stream of immigration, we have to consider whether this will be best given by cheapening transport or cheapening land. The former method seems likely to be the more effectual, if the region to be colonised is one which offers valuable special facilities for producing wares for the world's markets, so as to promise a remunerative return to capital employed on a large scale if only it can obtain an adequate supply of labour. For in this case we may expect to find purchasers or tenants for the land at a comparatively high price, provided that a considerable portion of the funds thus obtained be spent in transporting suitable labourers: and the high price, while it affords a fund for defraying or reducing the cost of immigration, will at the same time prevent the rapid acquisition of land by the labourers, so as to keep their services available for capitalist employers.[1]

iii. On the other hand, where the land offers no special

[1] Merivale considers that the successful application of this method is exemplified by the history of the Australian colonies during the generation succeeding the "Australian Land Sales Act" (1842), that introduced the system of sale by auction at an upset price of £1 per acre.

facilities for production for the outside market, the prosperous development of its resources seems to depend on attracting settlers who will cultivate the land largely with a view to subsistence for themselves and their families; in this case the most suitable encouragement to immigration seems to be to give the land to such settlers at a low or merely nominal price, under proper conditions of residence and cultivation. If this does not suffice to attract settlers who can pay their own expenses, the further step may be taken of giving cheap or gratuitous transport to carefully selected immigrants, and charging the land granted to them with the debt incurred. It would be too sanguine to expect that the whole of the cost incurred can be thus recovered; since a certain percentage of failures among the settlers can hardly be prevented by the most careful selection of emigrants: still with good management there seems no reason why the amount recovered should not be so considerable as to render it worth while to incur the inevitable loss, in the interests of national expansion.

§ 8. It remains to speak of the management of the relations between civilised settlers and the uncivilised tribes inhabiting the district into which immigration takes place—commonly called the "aborigines." It is not without hesitation that I venture to touch this question, as I can only treat it in a very brief and general way; while any student of the history of European colonisation must be profoundly impressed with its difficulty. What a well-informed writer,[1] by no means unduly sentimental, calls the "wretched details of the ferocity and treachery which have marked the conduct of civilised men in their relations with savages" form one of the most painful chapters in modern history; all the more painful from the frequent evidence it gives of benevolent intentions, and even beneficent efforts, on the part of the rulers of the superior race. At present in England there is a general agreement that the wellbeing of the uncivilised first-comers, found in regions colonised by civilised men, should be earnestly and systematically kept in view by the governors of these latter; and that the "aborigines"

[1] Merivale, *Colonisation*. Lec. xviii.

should be adequately compensated for any loss that they may suffer from the absorption of their territory—and ultimately of themselves—by the expanding civilised societies. It is therefore permissible to hope that in the future some closer approach may be made to the realisation of this ideal than has been made in the past; but we can hardly forecast this result with any confidence.

The question assumes different forms in what may be distinguished as (1) colonies of settlement where the manual labour can be and will be supplied by the civilised race; and (2) colonies—only called so in a looser sense—in which it can only supply capital and superior kinds of labour.[1] In the first case the main difficulties of the problem are likely to be transient; the incoming tide of civilised immigration will gradually submerge the barbarism of the aborigines; so that ultimately the question how to deal with them—even if they survive without becoming really fit for civilised work—will sink into a part of the general question of dealing with the incapable and recalcitrant elements found in all civilised communities. But in its early stages the collision of races is likely to be more intense in colonies of this class; since the process of settlement inevitably involves more disturbance of the economic conditions of the life of the aborigines.

On the other hand, in colonies where the superior race does not supply the manual labour, the difficulties of governing a community composed of elements very diverse in intellectual and moral characteristics must be expected to last indefinitely longer; but there is no stage at which the conflict of interests need be quite so acute as in the former case.

Of the two cases just distinguished the former has been most important in our past history; but its importance is rapidly diminishing, and in most of the territories open to

[1] I do not mean that a sharp line can be drawn between the two kinds of colonies. For instance, in our own empire, the South African colonies form, from this point of view, a series of links intermediate between Australia and New Zealand which are clearly colonies of settlement, and the West Indian islands which are clearly not.

the future expansion of civilised European States, manual labour is likely to be mainly performed by non-European races. I do not propose here to discuss in detail the method of dealing with either of the cases above distinguished; but only to indicate briefly the nature of the problems that arise and the principles *primâ facie* applicable to them, in accordance with the general view of politics taken in the present treatise. And, in doing this, I shall not attempt to distinguish between the international duty and the interest of the civilised nation aiming at expansion. I believe that here, as elsewhere, duty and interest are mostly coincident, but I could not undertake to prove that this is so in all cases. In what follows, therefore, I must be understood to have in view, as the ultimate end, the aggregate happiness of all the human beings concerned, civilised and uncivilised—native or imported. It does not seem possible—even if it were desirable—to check the expansion of civilised Europe: consequently, the problem of regulating and governing composite social aggregates, with a civilised minority superimposed on a semi-civilised majority, must be regarded as one of the most important proposed for European statesmanship in the proximate future.[1]

1. The first point demanding attention is the general claim of a civilised State to supreme control—whether as "Sovereign" or "Protector"—over territory inhabited by uncivilised tribes. This claim has to be considered in two aspects (1) as excluding the claims of other civilised States to expand into the same territory; and (2) as asserting rights of interference with the previous inhabitants of the territory. The conditions of its validity from the former point of view belong to an earlier part of the discussion:[2] here we are only concerned with the claim so far as it affects the aborigines. It would be going too far to say that no exercise of power over these latter is justifiable, unless the general consent of the persons subjected to it

[1] On the structure of government in colonies of this kind I shall have something to say in a subsequent chapter (xxvi.).

[2] See chap. xv. § 4.

may be presumed from agreements formally made by their chiefs or on some other adequate ground. But we may say that no serious interference of the civilised government with the aborigines should take place without such evidence of consent, except under circumstances which afford a special justification for it;—as (*e.g.*) when the civilised State has been victorious in a war provoked by the aggression of the inferior race, or when the interference is necessary for the security of its own subjects in the exercise of rights that they may fairly claim, or to protect the natives from the evils of intercourse with the most lawless and degraded elements of civilised society. Further, the claim of sovereignty should not be understood to carry with it any obligation to interfere with the laws or customs of the aborigines, even when opposed to civilised morality. Such interference should be regulated by an unprejudiced regard for the social wellbeing of the tribes subjected to it; which might be seriously impaired by the sudden abolition even of pernicious customs.

2. In regulating the relations between aborigines and settlers, the care of Government will be specially needed to prevent the interests of the former from being damaged through the occupation of land by the latter. We may lay down that the aborigines should never be deprived of any definite rights of property without full compensation; and that, so far as possible, such rights should be only ceded voluntarily. I cannot, indeed, hold that compulsory transfer is in principle inadmissible; since I cannot regard savages as having an absolute right to keep their hunting-grounds from agricultural use, any more than an agricultural occupant in a civilised State has a right to prevent a railway from being made through his grounds. Still, compulsory deprivation should be avoided as far as possible, even where it may seem justifiable, on account of the violent resentment that it is likely to cause. Further, the civilised government should supervise carefully the sale of lands by natives to private settlers; it may even be expedient, in the earlier stages of colonisation, that Government alone should have the right

of purchasing such lands; in order that undue advantage may not be taken of the ignorance of the aborigines, and that difficulties arising from complicated and vaguely defined rights of joint-ownership may be properly dealt with. Further, even where the aborigines have not been accustomed to claim or recognise any definite rights of property in the lands occupied by the settlers, I conceive that adequate compensation for the loss of the utilities in the way of hunting, fishing, etc., which they have been accustomed to derive from such lands, is none the less due to them. The necessity of making such compensation may be partly avoided by the reservation of certain portions of territory as hunting-grounds for the natives; but as the game in such reserves tends to be diminished by the progress of settlement around, and as the demand of the settlers for the reserved land will become increasingly intense, this can only be regarded as a temporary expedient. Nor is it desirable that it should be permanent in the interests of the natives; an indispensable part of the compensation due to them is education in civilised industry, especially agricultural industry: and where it is found difficult to persuade them to habits of steady labour, I conceive that so much coercion as is involved in refusing to provide sustenance except in return for work, may be legitimately applied to them.

3. Further restrictions on the freedom of intercourse and exchange between aborigines and settlers may be temporarily necessary; the extent of which experience only can determine, as the need for them will vary with the degree of intellectual and social development reached by the inferior race. Familiar instances of such restriction are the prohibition of the sale of intoxicating liquors, and the prohibition of the sale of firearms: but in some cases a more complete separation of races, and a more thorough tutelage of the inferior race, would seem to be temporarily desirable. It is, indeed, hardly likely that this kind of artificial isolation can ever be more than partially successful. I think, therefore, that such measures should generally be

regarded as essentially transitional, and only adopted—if at all—in order better to prepare the aborigines for complete social amalgamation with the colonising race.[1]

4. In any case the protection of the lives and property of the settlers will require effective prosecution and exemplary punishment of crimes against them: at the same time, it will be the imperative duty of Government to keep such punishment within the limits of strict justice. The difficult task of fulfilling this double obligation is likely to be better performed if those charged with it are not hampered by pedantic adhesion to the forms of civilised judicial procedure: what is important is that substantial justice should be done in such a manner as to impress the intellect of the aborigines with the relation between offence and punishment.

5. I have spoken of industrial education as an indispensable part of the compensation due from the civilised intruders. But their educational task should not be limited to this: it should include all kinds of instruction required to fit the inferior race to share the life of civilised mankind. In particular, though the religion of the settlers should not be compulsorily imposed on the natives, every encouragement should be given to the efforts of missionaries to teach it. Experience seems to show that the potency of such teaching as an instrument of civilisation varies very much in different cases, but few will doubt the desirability of allowing full scope to its application.

6. Among the restrictions on freedom of contract that are likely to be required between natives and settlers, the case of contracts of service deserves special attention; since, if such contracts are left unrestricted, there is a serious risk that the inferior race may be brought too completely into the power of private employers. This point is of course peculiarly important in the case of colonies in which

[1] Of course if it should become clear that the social amalgamation of two races would be debasing to the superior race, or otherwise demonstrably opposed to the interests of humanity at large, every effort ought to be made to carry into effect some drastic and permanent measures of separation. But I do not think that any proof has yet been brought adequate to support such a conclusion.

the superior race cannot or will not undertake the main part of the manual work required: in this case the demand of the capitalist employer for a steady supply of reliable labour led modern civilisation in its earlier stage back to the institution of slavery in an extreme form: and prompts even now to longing aspirations after some system of compulsory labour, which shall have the economic advantages of slavery without its evils. But I know no ground for thinking that such system can be devised: and should accordingly deprecate any attempt to approximate to it. I do not therefore infer—as some have inferred—that contracts of long duration ought to be prohibited altogether; but only that they ought to be carefully supervised and closely watched. The need for this vigilance arises equally — it may be even greater—when the labourers in question are not natives, but aliens belonging to a lower grade of civilisation; at the same time there are strong economic reasons for introducing labour from abroad in colonies of this class, where the natives are either not sufficiently numerous or wanting in industrial capacity. Here, again, we require the aid of special experience to determine the precise conditions under which such contracts should be allowed in the diverse circumstances that may arise.

# PART II

## THE STRUCTURE OF GOVERNMENT AND ITS RELATIONS TO THE GOVERNED

## CHAPTER XIX

### METHODS AND INSTRUMENTS OF GOVERNMENT

§ 1. In the preceding chapters we have been occupied in surveying the work of government from the point of view of the governed: that is, we have concentrated attention on the effects that Government ought to aim at producing in the condition and mutual relations of the private members of the community governed, and in their relations to individuals and communities outside. In the six following chapters I shall be employed in considering how Government should be constituted for the proper performance of the functions which our discussion up to this point has marked out for it; how the necessary organs of government should be appointed; and what should be their mutual relations. The present chapter forms the transition or connecting link between the two discussions. I propose here to make a brief survey of the whole work marked out for government, with the special object of determining in a general way the kind of methods and instruments that will be required for its satisfactory accomplishment.

I shall assume, for simplicity, that we are concerned with what may be called "unitary"[1] States:—that is, with States in which the ordinary exercise of the highest powers of Government belongs to a central organ or organs, exercising control over all the members of the State; while only matters of secondary importance are handed over to the independent

[1] I use this term to contrast them with Federal and other composite States, the peculiarities of which will form the subject of a special chapter (xxvi.).

management of local governing bodies. I shall also assume the unity of government in a different sense; *i.e.* I shall assume that, however the functions of government may be divided among different persons and bodies, there is no ultimate conflict among these organs; so that, though there may be differences of view among them leading to debate and mutual criticism, still their final decisions, demanding the obedience of the rest of the community, are as harmonious and consistent as if they emanated from one rational will. In subsequent chapters, examining more closely the constitution and relations of different organs of government, we shall have to take note of the possibilities of conflict among them, and consider expedients for avoiding and removing it: and in the concluding chapter of the treatise I shall analyse the forces by which the harmonious action of government is, or may be, maintained in modern States in their normal condition; but for the present I shall simply assume it to be maintained, and shall speak of "Government" as possessing unity of action, however its powers may be distributed.

For clearness of view let us first limit our attention to what I have characterised as the "individualistic minimum" of governmental work — what other writers have distinguished as the "necessary" from the "optional" functions of government. Suppose, then, that the functions of government are merely to maintain general security from coercion and intimidation, and intentional and culpably careless injury to person, reputation, or property, and from loss caused by failure to perform contracts—according to the definition of these rights before given; to make provision for children, throwing the burden of their support and education on their parents; to protect the interests of the community generally, and of individual members of it so far as may be necessary, against the attacks of foreign enemies—at the same time compelling its own subjects to abstain from violating the rights of foreigners; and finally, to provide for its own maintenance, and its own defence against internal as well as external foes. Let us consider what

governmental machinery will be necessary or expedient for the performance of these functions.

In the first place, as we before saw, adequate inducements must be given to all persons to perform their fundamental duties and refrain from infringing the fundamental rights of others. This end may be partly attained by enforcing, at the request of the person whose right has been infringed, *redress* or *compensation* from the person who has infringed it; but in the case of grave transgressions of duty it will also be necessary to inflict on the violators some further *punishment*—beyond the penalty involved in the enforcement of compensation—moreover, there are certain kinds of mischievous conduct which, as they do not give occasion for compensation, can only be repressed by punishment. Accordingly, whenever a sufficiently serious transgression of duty appears, or is alleged, to have occurred, it will be the business of Government, firstly, to decide, after an impartial examination of the facts, whether or not the transgression has actually taken place; and secondly, whenever such transgression is proved, to take such steps as may be necessary for compelling adequate redress or compensation, and inflicting adequate punishment. It is obvious that these two businesses require to a great extent[1] different intellectual faculties and habits for their efficient conduct: the former is a purely intellectual process, requiring a thorough and exact knowledge of the rules of civic duty that Government has to enforce, and impartiality and expertness in applying them to particular cases: the latter demands skill in organising and combining the labour of a number of subordinates—policemen, prison officials, etc.—with appropriate materials and instruments, for the attainment of definitely prescribed physical results. We have therefore *primâ facie* reason to allot these functions to separately constituted organs,[2] which—in accordance with usage—I will call respectively

[1] I am only here concerned with broad distinctions. I shall afterwards show that the functions of the judiciary and the executive are necessarily in some degree similar, and that the division of work between the two organs is in some respects doubtful and varying.

[2] Further reasons for this separation will be given in the sequel.

the *Judiciary* or *Judicial* organ, and the *Executive*. It is the latter that will actually have to bring such force as may be required to overbear any resistance that may be offered by recalcitrant transgressors: it must therefore provide, organise, and train this force, so as to apply it when needed in the most effective and economical way, and with the minimum of social disturbance. But the organised physical force of the community will also be required—and ordinarily to a much greater extent—for the purpose of repelling the aggression of foreigners: and since it is obviously desirable, to prevent dangerous conflicts of authority, that its ultimate control should be in one hand, there is a strong *primâ facie* reason for making the organ that deals with the foreign relations of the State identical with what we have called the Executive, so far as its highest directive function is concerned. I shall, accordingly, assume provisionally that this is the case, and that it is the business of the Executive to receive foreign ambassadors, and to watch over the interests of the State and its members abroad, through the agency of ambassadors and consuls,[1] and through correspondence with foreign governments; and also to organise and equip armies and fleets for foreign warfare, and direct their action when war has broken out.

Turning again to internal affairs, we may note that, even if the functions of government are confined within the narrowest limits, it must be the further business of the Executive to arrest suspected criminals, and keep them in

[1] Consuls in modern States are officials resident in foreign countries, appointed to watch over the interests of the subjects of the State appointing them. They are allowed by the State in which they reside to exercise quasi-governmental functions of a subordinate kind, for the benefit of subjects of the State which they represent:—such as administration of the property of such persons dying in the country where they reside, arbitration in disputes voluntarily brought before them by such persons, authentication of births and deaths, etc. They have also to inform the government appointing them of any injustice done to its subjects. This latter function is obviously of greater importance in the case of imperfectly civilised countries: and in such countries the powers of consuls are sometimes extended to include criminal jurisdiction over the subjects of the country which they represent, and civil jurisdiction in cases to which such subjects are parties.

confinement if the crime be grave. Moreover, it is obviously desirable that Government should stop offences, if possible, before they are completed, prevent them if the intention to commit them is manifest, and remove continuing sources of injury and clearly illegal annoyance. Policemen, accordingly, will be required for these purposes, no less than for bringing criminals to punishment.

Again, we have before seen (chap. xi.) that, for the adequate performance of all the various functions above described, kinds and amounts of labour are required which cannot be expected to be obtained gratuitously, and cannot well be imposed, as unremunerated duties, upon any class of citizens in a modern State: and that, accordingly, in order to provide the required remuneration and the various instruments and materials needed for governmental purposes, Government must have the power of levying taxes on the income or property of the governed. We must therefore add to the Government a financial department, to superintend the collection of these taxes, and their distribution for the different purposes of governmental expenditure. Tax-collectors, paymasters, accountants, comptrollers, and auditors, will be the subordinate officials in this department; and their operations will be directed by superior officials, whose business will be properly classed with that which I have called Executive. Further, it seems clear that the proportion of the national income required for governmental expenditure cannot be fixed once for all, owing to the great varieties that occur,—chiefly through foreign wars, and dangers of wars—in the needs of Government. "The public," as Hobbes says, "cannot be dieted"; so that private members of the community must submit to the degree of insecurity involved in an indefinite right of Government to take their property. It is therefore important, in order to minimise this insecurity and render the exercise of this power of taxation as little formidable as possible, that the taxes to be levied should not be determined by the officials who will have to spend the proceeds, or other officials under their influence: it is important that the "budget" of the State

should receive the assent of a separate and independent body, specially qualified to watch, in the interest of the taxpayers, the collection and expenditure of the taxes, and to prevent as far as possible any oppressiveness in the former or excess in the latter. It is, accordingly, an accepted principle in the construction of a modern government, that the ultimate control of governmental finance should be in the hands of such a body.

§ 2. So far I have said nothing of a Legislative organ, having the function of laying down the general rules of civic duty which the Judiciary has to apply to particular cases. But if the State requires laws, it seems an obvious inference that it needs a special organ for the supremely important work of laying down the laws required; and, as in fact such an organ exists in all modern States, I have not hesitated to assume its existence in previous chapters. Still, the obvious inference from law to a legislature is not quite so indisputable as it seems, if we suppose the action of government to be strictly confined to the individualistic minimum. As has been before observed, a great part of the rules enforced by Government in our own society have not had their origin in express legislation; they have been gradually brought to the degree of precision and elaborateness which they have now attained, by a series of judicial decisions which ostensibly declared and applied rules and principles handed down from time immemorial. And it might be held that this judicial quasi-legislation is, even in a highly civilised society, the best machinery for introducing such improvements as may be required in the definition of the fundamental rights and duties that constitute the "individualistic minimum."

The issue thus raised will be most conveniently discussed by distinguishing two questions; (1) whether it is expedient that legal duties should be capable of being known as exactly as possible by the persons who have to fulfil them; and (2) whether legislative enactments or judicial decisions[1]

[1] It should be observed that is not necessary that the *intellectual* part of the process of judicial development of law should be even mainly performed by the judges: it may be mainly due to the action of teachers and writers having no official position.

afford the best means of attaining this end. In examining the first question—since there are some who are hardly able to conceive it answered otherwise than affirmatively,—it will be well to put the case as plausibly as we can on the opposite side. We may do this by laying stress on the analogy between law and morality. What is called the "moral code" is very unprecisely apprehended by ordinary persons: and it is not uncommonly held that attempts to formulate it precisely are mistaken, and liable to do harm rather than good by encouraging persons to conform to the letter of the formulæ laid down, while really disloyal to the underlying principles. Every one, it is often said, knows broadly what he ought to do; in difficult cases he had better trust to instinct; if he goes wrong and deserves condemnation, his ill desert will be easily apprehended —at any rate after the event—by an experienced and impartial spectator. It seems quite possible to treat the legal code similarly; indeed, it might be fairly urged that the legally obligatory part of our moral duty is generally the easiest to know. Every plain man is perfectly aware that he ought not to slay, or wantonly beat, or insult and defame his fellow-citizens, that he ought not to steal, cheat, break his promises, neglect his children, etc.: if he commits any of these offences he will almost always be conscious that he has done wrong; and if he should lack this consciousness, his judge at any rate will have no difficulty in coming to a decision which will be generally approved. Grant that there are cases "on the line," which even an expert would have some difficulty in deciding, and in which, therefore, a plain man cannot be expected to know his strictly legal duty; still, it may be urged, this ignorance has its advantages, as a plain man should keep aloof from this ambiguous margin; if you tell him the precise limits of his legal obligations, you hold out to him a dangerous temptation to go as close as possible to the limit, when interest or passion urge him in the direction opposed to duty.

These arguments seem to me not devoid of force. Indeed, it is because they contain an important element of

truth that the legal maxim, "ignorance of the law excuseth none," is not in practice so oppressive as it at first sight appears. The ordinary citizen of a modern State certainly does not know the law of his State; but, if he acts on his common-sense view of social duty, the cases in which he is in danger of coming into collision with his law are comparatively few. And it is a matter of common experience that the more precise knowledge of particular rules of law, which a minority of persons attain by special study, is sometimes used for the purpose of evading social duties and taking an unfair advantage of the ignorance of others.

But such force as the arguments above given may be allowed to possess, is decidedly outweighed by the consideration of the insecurity, inconsistency, and inequality, that tend to result from imperfect definition of legal duties.

In considering the first evil—insecurity—we see that the analogy just suggested, between doubtful or marginal cases in morality and similar cases in law, is not a close one. When confronted with a problem of moral casuistry, where there is a *primâ facie* conflict of duties, a man who means well may usually hope, even if he is severely condemned by some moral persons, to be acquitted or even praised by others. But in the case of legal penalties there can be no such mixture and balance; they must be either inflicted or not inflicted; and though punishment proper might sometimes be remitted or reduced where the absence of criminal intent was clear, such remission could not be counted on; since very mischievous acts, needing severe repression, may be done by thoroughly well-intentioned persons: and in any case damages due to private individuals wronged could not be remitted. And to the suggestion that the danger of having to suffer punishment or pay damages might be avoided by keeping well within the limits that separate allowed from forbidden conduct, it may be fairly replied that the most innocent persons are continually liable to be brought near these limits in certain directions by their social functions and relations. For example, an honest newspaper editor cannot be sure of giving the law of libel a "wide

berth," a schoolmaster requires to know exactly what punishments he may inflict, a tradesman how far he is responsible for the quality of his goods, any owner of property how far he may use violence to ward off encroachments on his rights. Especially in the case of rights of property, the precisest possible definition is often needed to prevent litigation and ill-feeling even among persons sincerely anxious to act rightly; since it is often the duty of such persons to enforce their pecuniary rights to the full, for the sake of others whose interests they have in charge.

Then we have to take into account the further evils that would result from inconsistency in the application of legal rules. The decisions of judges would inevitably differ widely —assuming that no one was bound by precedents—and the general respect for law would suffer in proportion: especially as the consequent inequality in the treatment of similar cases could not but be felt as injustice. For, however men may disagree in the application of the idea of justice, there is one point on which they agree—that similar cases should be treated similarly.

I conclude, then, that the utmost attainable definiteness in legal rules is on the whole to be regarded as a gain, subject to the condition,—which has been assumed throughout the preceding argument for definition,—that the defined law is capable of being known by the persons whose rights and duties it determines. For to lay down laws with extreme precision, but in such a manner as to render them practically unknowable by the persons who have to obey them, would obviously fail to give the desired security: hence effective publication of a new statute is always held to be essential to good government. It may be urged, however, that this "cognoscibility,"—to use Bentham's term—of law, is an unattainable ideal: since an ordinary member of a modern State could not possibly know the elaborate system of legal rules that has been gradually worked out to meet the requirements of the complex society to which he belongs, even if they were expressed and arranged in the clearest possible manner, and purged from all historical survivals and useless

technicalities. This is certainly true, but no such extensive knowledge is practically needed by an ordinary citizen: it is only a minute fraction of the legal code of his country, varying according to the nature of his calling and his social position, that it would practically profit an ordinary citizen to know for the ordinary business of his life; while for rare and important transactions it is no great burden that he should have to take legal advice. It seems, therefore, expedient to facilitate the acquirement by an ordinary citizen of such knowledge of the laws of his State as practically concerns him; while, in order that the work of giving legal advice and the administration of justice may be as economically and effectively performed as possible, and that changes in law may not be made ignorantly and unskilfully, it seems no less expedient to render a knowledge of law easily attainable by legal advisers, pleaders, judges, and legislators.

§ 3. Assuming then that we are to aim at making laws as definite and as cognoscible as possible, let us consider how far this result may be better attained by express legislation, or by continuing the process of development, through judicial decisions, which has had so large a share in determining legal rules in earlier times. In the first place, it is clear that, so far as definite and palpable changes in law are demanded, in consequence either of changes in social conditions or of increased insight into social needs, it becomes more and more necessary, as the development of law goes on, to obtain these by express legislation; since, as we saw,[1] the process of judicial law-making tends to be confined within continually narrowing limits in virtue of the very principle that has rendered it possible—the principle that decided cases are binding judicial precedents.

It may, however, be said that such changes in law as may be needed at the present stage of social development can hardly relate to what I have called the individualistic minimum; that the fundamental rights of personal security, property, contract, etc., must have been long since determined in any civilised State; and that so far as exacter definition

[1] Chap. xiii.

may be required on doubtful points—as, *e.g.*, whether it is murder to kill and eat a comrade on the high seas to avoid starvation—this definition is still best given by the judges. And no doubt modern legislation is not mainly concerned with the substantive law governing these fundamental relations of individuals, but either with the organisation of the governmental machinery for securing them, or with interference that goes beyond the individualistic minimum. Still there are minor questions, but of real importance, even within the individualistic minimum, with which legislation here and now has to deal: and it may be worth while to give a few examples of these from recent English legislation.

To begin with personal security—the general principle is clear, that a man should be protected from injury wilfully or carelessly caused by other men: but in applying the principle, new precautions are continually needed against new dangers, which changes in social relations or industrial conditions have rendered more formidable: and it is a complicated and delicate matter to devise just the right precautions, owing to the general risk that, in protecting the security of one individual, we may too much hamper the freedom of others to perform useful social work. Thus, *e.g.*, to ward off perils from explosive substances it was till lately thought sufficient to regulate their manufacture and carriage, and their use under special circumstances, as in mines: but a few years ago, when the conjunction of revolutionaries and dynamite intensified this peril in England, the governmental protection was increased, partly by severer penalties on proved co-operation in criminal use of explosives, but partly also by throwing on the possessor of the dangerous substance under suspicious circumstances the burden of proving that he had it for a lawful object.

So, again, it requires much care to secure the reputation of individuals from improper attacks without interfering with the useful function of newspapers in spreading information and criticism: and thus it was found that a more exact determination of the law of newspaper libel was needed some years ago: by which newspapers were made free of

any responsibility for reporting speeches at public meetings, provided they inserted any contradictions or corrections sent them by the speakers.

To turn to property: the main utilitarian principle on which the institution of private property rests is the expediency of encouraging productive labour (and due care for what has been produced) by securing the product to the labourer: but in the case of intellectual products, such as industrial inventions, it is impossible to do this without some risk of interfering with the inventive enterprise of other men: and it needs a very careful regulation of the conditions under which inventions are protected by patent, in order to give adequate encouragement to the inventor protected, while hampering other inventors as little as possible. Hence it is not surprising that changes in our Patent Law should have been recently required, and that wider changes should still be urged. And the same remark applies to other immaterial products of labour which cannot be appropriated as material things are.

As regards contract: I have already noticed the important limitation of contractual obligations imposed by the law of Bankruptcy, according to which debts of money cease to be legally due from persons who have at some previous time proved their inability to pay and given up their property for division among their creditors. This limitation of the effects of breach of contract is on the whole expedient, in order to restore to insolvent persons adequate inducements to useful industry: but it involves great risk of encouraging reckless and improper dealing with borrowed resources; and the problem of reducing this risk to a minimum has been found very difficult. The British Parliament has legislated on the subject repeatedly and recently, but it cannot be confidently affirmed that fresh legislation will not soon be needed.

Experience, therefore, seems to show that a Legislative organ is continually needed, in a modern State, to secure the best possible definition even of the individualistic minimum of legal duty. And in fact, it is not on this point that controversy is commonly raised. The question usually dis-

puted is whether, with a view to the utmost attainable "cognoscibility," legislation in a modern State should not merely supplement deficiencies in the judicial development of law, but should aim at covering the whole field, by codifying the results of this development. On this question it befits a layman to speak with brevity and reserve: but it seems undeniable that judge-made law must *ceteris paribus* be less cognoscible than statute law; since the binding rules involved in judicial decisions, so long as they are not authoritatively extracted in a general form, have to be studied and reasoned about as "embedded in matter," enveloped in the circumstances of the particular case; and this must render it more difficult to know and apply them. It may be said that the codified law will inevitably have ambiguities and inadequacies which will set the process of judicial interpretation and extension at work again,[1] so that the obstacles to knowledge which codification aims at removing will reappear: but they can hardly reappear to an equal extent; and there seems no reason why they should not be from time to time removed by amending statutes.

On the other hand, it is said that "to reduce unwritten law to statute is to discard one of the greatest blessings that we have for ages enjoyed, in rules capable of flexible interpretation."[2] And it must be admitted that, supposing equal minuteness in the rules applied, there must be greater flexibility in their application when the judge is bound by express general statements of the law, than when he is only bound by the general rules implied in judicial decisions on particular cases: but it would seem that this additional

[1] It is of course possible to make only the code formally binding and not any judicial interpretations of it;—as is in fact the case in most European States. But the practical differences will not be great, so far as the judges are practically influenced by precedents; while, so far as they are not so influenced, the advantage of the superior cognoscibility of the code will be reduced by the practical uncertainty of its application.

[2] This was said by Mr. Justice Talfourd in 1853. I do not know how far leading English and American jurists at the present day—who seem to be more impressed by the extreme minuteness of the rules that have been worked out by a series of judicial interpretations—would be generally disposed to lay so much stress on the "flexibility" of our law.

flexibility must be gained at the expense of definiteness as well as cognoscibility—unless we suppose the written rules to be badly expressed.[1]

§ 4. But, without attempting to decide the disputed question of codification, it may be laid down that the modern State would require a Legislative organ, even if the matter of legislation were strictly limited to the narrowest individualistic minimum, and all changes in the machinery of government were left out of account. The need, however, of a continually active legislature becomes more palpable and obvious when we admit the necessity of governmental interference (with sane adults) of the kind that I have called "indirectly individualistic" and "paternal": — such as the prohibition of insanitary dwellings and food, and generally the enforcement of precautions against disease, the restriction of the sale of intoxicants, the repression of gambling, the regulation of such dangerous industries as mining and navigation, or the manufacture of explosive substances; and when we take into account the State's duty to care for the interests of others than sane adults—especially to supervise the rearing and training of children and protect them from parental neglect and from any oppressive and injurious treatment. And the need will be further increased if we include various kinds of interference, which I before classified as "Socialistic," in a wide sense of the term; *i.e.* if Government is to regulate the use of natural resources—rivers, forests, mines, sea-fisheries—and to make special laws for the tenure of land; to undertake a large share of the business of conveyance and communication; to monopolise coining and regulate the issue of bank-notes. A fresh *quantum* of legislation will be required if we admit interference with the special aim of benefiting the poor, as by compulsory and partially gratuitous education, poor-relief from public funds, compulsory and state-aided insurance against sickness and old age. As we have before remarked, an important amount of interference

[1] I do not here consider how legislation should be organised in order that we may obtain statutes drawn with as much skill as is in England commonly applied by judges in determining the application of precedents.

under these various heads is actually undertaken by all modern States, and the tendency at present is to extend it: and it is obvious that so far as these measures involve encroachments on freedom, legislation of a complicated and delicate kind will be required, to render the action of government in these various ways at once as useful and as little mischievous as possible.

It is further evident that in order to carry out effectively the various kinds of governmental interference which I have classified as "indirectly individualistic," "paternal," and "socialistic," the Executive will have to be made considerably more extensive and complex. For instance, the regulation of dangerous industries involves a need of new functionaries of various kinds, to inspect the places in which the industries are carried on, to give licences which may be withdrawn if conditions are broken, to test and certify the training of certain classes of skilled labourers; while, so far as Government does not merely regulate, but actually takes certain departments of industry into its own management, the work of the Executive may be further enlarged and varied almost indefinitely. If governmental interference in England were strictly limited to the individualistic minimum, we should only require for executive work—leaving the external relations of the State out of account—something like the Home Office, together with certain local authorities, to manage the machinery for prevention and punishment of crime, and the Treasury to manage the finances. It is because our State undertakes so much further interference of the kind exemplified in the preceding paragraph that the functions of such additional departments as our Education Committee, Local Government Board, Board of Trade, and Post Office, are needed.

It should, however, be observed that the social needs, which give occasion for various kinds of governmental work going beyond the individualistic minimum, are partly supplied in England and other modern states, by private enterprise and voluntary associations, or by philanthropic efforts and funds given or bequeathed by private persons to

public purposes. One consequence of this is that the intervention of Government in the arrangements for supplying these needs does not necessarily involve the action of the executive organ. It may, in some cases, be carried into effect by legislation giving coercive powers, or other special privileges or pecuniary aid from the funds of the State, to voluntary associations, either on a commercial or philanthropic basis;—usually under the condition of conforming to special regulations laid down by the legislature. Thus,—to take an instance of a commercial association,—an English railway company, on account of the social importance of its work, is granted a special power of compulsorily purchasing the land that it requires, and in return for this privilege is required to conform to regulations laid down by the legislature in respect of the rates that it charges for the conveyance of goods and passengers. At the same time it has the power of making "bye-laws" for the regulation of its traffic, and attaching penalties which law-courts will enforce to the breach of them. So, again, elementary education in England is largely carried on in schools under private management, and partly supported by voluntary contributions, but which, in return for grants of public money, are required to conform to conditions laid down by Government. The Bank of England, and the institutions by which our medical and legal professions are partially self-governed, come under the same general head. Institutions of this kind, which we may call "semi-public," afford a useful machinery for supplying social wants better than the unaided and unregulated action of private persons would supply them, without unduly increasing the responsibilities or the powers of Government.

The semi-public character of such institutions has various degrees: sometimes, as we have seen, it involves a share of the coercive function which is the peculiar attribute of Government; sometimes it is given by the grant of pecuniary assistance from State funds, usually under conditions, but without any share of coercive power; sometimes, again, the funds by which an institution is supported are private in

their origin and only public in their destination, being derived from the donations or bequests of individuals. In this last case the interference of government should not ordinarily go beyond the supervision necessary to prevent such funds from being misapplied, with occasional revision and modification of the rules under which they are applied, when circumstances have rendered their original application no longer expedient.

§ 5. The distinction just noted between coercive and non-coercive functions is no less applicable—and is highly important—in comparing the different kinds of executive business performed by governmental officials. The most important part of this business—especially of that which falls within what I have called the individualistic minimum—consists in interference of a coercive kind with the freedom of individuals, *e.g.* in preventing and punishing crime and levying taxes. But other not unimportant parts of governmental work, especially of the kind that I have classed as socialistic, are usually not coercive, except in the indirect way of requiring funds that have to be raised by taxation; and such work has not always even this indirectly coercive character, since it may be carried on remuneratively, just like a private commercial enterprise. Thus, for instance, the business of various kinds carried on by the Post Office in England yields a large annual surplus to the State; and though the main part of this business—the transmission of letters and telegrams—is protected by a monopoly, and so far involves coercive interference with the ordinary rights of individuals, this is not the case with the conveyance of parcels, nor with the insurance and savings bank business performed by the same department. In these latter cases, then, the coercive element of governmental interference is altogether wanting; the businesses are regarded as governmental, because they are supported by public credit, and carried on by officials appointed by government, but these officials in dealing with other members of the community have only the same rights as the ordinary law secures to private persons.

The difference between these two species of executive functions should be carefully kept in view when we turn to consider the question, of fundamental importance in constitutional construction, as to the relation of the executive to the legislature. So far as the functions of the executive are internal and coercive, I have implicitly assumed that they will be limited by law; *i.e.* I have assumed that, so far as the executive may invade by physical acts, or restrict by commands, the ordinary private rights of citizens, it will do this strictly in accordance with laws that withdraw or limit these rights, in the special case of the persons concerned, either by way of penalty or for some special end of public utility. This condition is generally necessary to realise the security that the laws are designed to give to private persons; since this security would be seriously impaired if the physical force controlled by the executive could be employed in violation of the law as well as for its enforcement, at the discretion of the persons controlling it. I hold it, indeed, to be necessary that the executive should have a power in exceptional emergencies of infringing the ordinary rights of private citizens in ways not capable of being specifically defined beforehand; but I also hold that some constitutional security ought to be provided to ensure that this governmental illegality is confined to the rare cases in which exceptional circumstances justify it. At any rate, we may assume that normally the coercion of the executive will be exercised within the limits of the laws that define the private rights of citizens. And if this restraint is to be thoroughly effective, the executive that is not to break these laws must not alone have the power to make them: the supreme authority to modify these laws must be vested in a legislative organ, wholly or in a great measure distinct from the executive. But it is not equally clear that the executive should be any further subjected to rules laid down by a legislature distinct from it. We can easily suppose a legislature and an executive in complete mutual independence as regards appointment, organisation, and methods of procedure; the former determining the rules that the citizens generally should obey, and the

maximum and minimum penalties they should suffer for disobedience, and the latter determining at its own discretion the instruments and methods for repressing disobedience, and enforcing punishment and reparation in accordance with the decisions of the judiciary.

The case, however, is different when we consider the relation of the executive to the organ which we have seen to be required for the ultimate control over governmental finance. The coercive work of the executive cannot be made self-supporting; hence the need of obtaining funds for its support will tend to bring it within the control of the money-granting organ, whose duty it will be to examine carefully any costly changes that may be proposed in the organisation of the executive, and to use its power of the purse to secure economy as well as efficiency in its construction and operations. This is equally true of the usually larger expenditure caused by the need of providing for resistance to foreign aggression. If the heads of the executive were at liberty to organize the army and navy and civil service as expensively as they thought fit—the money-granting organ being bound to find funds for the expenditure thus entailed—the financial control of this organ would become insignificant, and the protection from over-taxation that it is designed to secure to private citizens would be almost illusory. The same may be said of the non-coercive work of the executive, so far as it is financially onerous. It is not, indeed, so clear that any branch of governmental industry which yields a profit need be brought under the control of the money-granting organ. Still it seems on the whole desirable, with a view to the careful adjustment of the supply of public funds to the needs of national expenditure, that the control of the money-granting organ should extend over the whole of governmental finance; especially since any non-coercive branch of governmental industry, even though it may be actually yielding a profit, will usually entail a certain liability on the general public exchequer.

We have now to observe that, in modern States generally, the legislature is identical — in the main, if not

altogether[1]—with what I have called the "money-granting" organ. And there are obvious reasons why this identification is desirable, since many important kinds of governmental interference require both legislation and expenditure of public money; and in such cases the division of responsibility, which would result if legislation and money-granting were allotted to separate bodies, would not conduce to the desirable combination of efficiency and economy. Indeed, the body that had the ultimate control over finance could hardly be prevented from acquiring an indirect but important control over all legislation involving fresh expenditure. Again, the conditions of employment of the labour of various kinds required for the performance of executive functions ought not to be regulated solely from an economic point of view, with the aim of obtaining the maximum of work at the minimum of cost; the wellbeing of the servants of Government and those dependent on them should also be kept in view; and this result will be more likely to be attained if the organisation of the executive is placed under the control of a body that determines legislation generally and not merely finance. I shall accordingly assume, in what follows, that the legislative organ has also the function of determining changes in taxation and controlling governmental expenditure: leaving for a subsequent chapter the consideration of any differences in detail that it may be desirable to introduce between the process of legislation and that of determining a budget.[2]

But further, there are important considerations—apart from the financial—which render it desirable to place the procedure, if not the organisation, of the executive under the control of the legislature as such. In the first place, so far as it is necessary for the efficiency of any department of the service of Government that the persons employed in it

[1] Measures for raising revenue are generally regarded as a species of legislation, to be determined by the same bodies that determine other kinds of legislation; but where the legislature consists of two chambers—as is usually the case—the distribution of the powers between the two chambers, in respect of measures for raising revenue, is often different from their distribution in respect of legislation generally.

[2] Cf. chapter xxiii.

should be subject to severer penalties for breach of rules than would be imposed for the breach of ordinary contracts of service—as is commonly held to be the case with military forces—it is important that these penalties, and the rules for breach of which they are to be inflicted, and the procedure for determining their infliction in any particular case, should receive the sanction of the legislature. A reason of wider application is, that the power of interference with ordinary private rights which, for the mere defence of these rights it is needful to vest in the executive, involves,—to use Bentham's phrase—a formidable "sacrifice of security to security"; and that, in order to limit the sacrifice as much as possible, it is expedient to place this power under restrictions other than those involved in the legal definitions of the duties of private citizens and of the penalties for breaches of duty.[1] Familiar examples of these restrictions—which we shall consider more fully in subsequent chapters[2]—are the limitations on the power of arresting on suspicion of crime, and detaining in prison before trial, and on forcible entry into private houses, for which provision is made in several modern constitutions. Further, owing to the inevitable imperfection of law, there will always be some danger that the exercise of the power of the executive may become practically oppressive without being illegal. Hence it seems desirable, for the fullest possible security to the citizens generally, not only that this formidable power should be kept strictly within the limits of the law, but also that its exercise within these limits should be subjected to the watchful criticism of the legislature; partly because the careful performance of this function of critical supervision is likely to throw light on defects in the law capable of being removed by new legislation,[3] partly in order that the desire of avoiding inconvenient legislative restraints may itself operate as a moral restraint on the executive.

[1] Legislative regulations for the treatment of convicts may be regarded as merely more exact definition of the penalties of imprisonment.

[2] See chapters xxiv. and xxvii.

[3] I do not assume that the executive will be, formally or practically, appointed and dismissed by the legislature.

§ 6. It may be expedient that some part of the regulation that I have summarily described should be withdrawn from the control of the ordinary legislature, and settled on a comparatively permanent footing by an extraordinary legislature, so as to be only capable of modification by a more elaborate and tardy process than ordinary legislation. Still, it would seem that what will be left to the ordinary legislature must be enough to place the executive organ normally in a relation of subordination to it. And indeed this relation of subordination is implied in the term "executive:" which properly denotes an organ whose function it is to carry out the orders of some other organ. In fact this implication has caused some writers to object to the application of the term to the high officials in modern States—kings or presidents and their ministers—who are the heads of what I have called the "executive" departments of government. It is urged that the popular designation of these officials as "the government" is really more correct: since within very wide limits they form—and ought to form—resolutions and issue orders, general as well as particular, on their own responsibility. I think it is true that, for the effective performance of governmental functions, monarchs or ministers must have some power of making general rules to which not only their subordinates but other citizens also, under certain circumstances, have to conform. But I do not therefore consider the term Executive inappropriate to describe the normal duties of these officials, so far at least as the internal functions of government are concerned: since, in internal affairs, the general character of normal governmental interference is capable of being defined by law, and must be expected to be so defined in an advanced modern community in which legislation is active: so that the special ordinances and regulations which the heads of the (so-called) executive departments issue are properly conceived as carrying out the general design of the legislature.

I admit, indeed, that in a State whose constitution has had a gradual development, the powers of the executive, like the rights of private persons, will probably be to an

important extent determined by custom and precedent, and not expressly conferred by statute. But all such customary law is to be regarded as modifiable by legislation of some kind in a modern State: and it will be convenient that the law determining the functions of the executive should be—to a great extent, if not altogether—modifiable by the ordinary legislature, in order that the changes which we must expect to be required from time to time may be effected without undue delay. Again, I have before admitted that, under exceptional circumstances, it may be the duty of the so-called executive to take measures, not capable of being defined beforehand, for preserving order or protecting the interests of the community from serious detriment, and that such measures may inevitably conflict with established legal rules. But I conceive that these occasions are essentially abnormal, and that it should be the aim of statesmen to keep such justifiable illegality within the narrowest possible limits: and it seems reasonable in our constitutional terminology to take account of the normal relations of the different organs of government rather than the abnormal.

The case is different as regards foreign affairs. In the first place, it is, generally speaking, an important part of the business of the organ of government that deals in the name of a State with other States and their members, to conform to the established rules of international duty which do not rest on the authority of any one State's legislature, and therefore ought not to be regarded as normally modifiable by any such legislature,—although the latter may sometimes have to give an authoritative definition or interpretation of certain international rules for the guidance of members of its own State. And further, within the limits prescribed by international law and morality, it seems clear that the legislature could not conveniently determine the conduct of war or negotiations by general rules in anything like the same degree as the internal functions of government; owing to the extent to which wise management of foreign relations must vary with varying combinations of circumstances incapable

of being foreseen. The legislature must either in the decision of these matters leave a very wide discretion to king or minister, or else itself take part in the decisions, and so go beyond the sphere of legislation.

I admit, therefore, that the term "executive" is not quite appropriate to denote the power and function exercised by the organ of government that deals, in the name of the community, with foreign states. Still I conceive that this power and function cannot well be separated from the internal executive power and function, as regards the highest direction, the ultimate control of both: since for either the whole organised physical force of the community may be needed in the last resort; so that the ultimate control of this physical force must be placed in the hands of one individual, or of a body that can act as one, if we would not incur the serious risks of divided authority at a crisis. I propose, therefore, to take the term "executive," as implying that the organ of government so denoted acts *to a great extent* under rules laid down by the legislative organ, and with a general duty of carrying out the intentions of that body.[1]

§ 7. It will be seen that the same general considerations which have led us to regard the executive as normally standing to the legislature in a relation of subordination, also tend to show that the subordination should not go so far—even in matters of internal administration—as to make the legislature practically the supreme executive. For, if this were the case, then the security against oppression, given by its critical supervision of the executive, would be lost: another independent organ would be required to watch and criticise the legislature.

It may perhaps be asked, why should not, in any case, the danger of oppression by the legislature be as formidable, and call for as vigilant precautions, as the danger of

[1] It may be noticed that the word "administrative," which some writers —*e.g.* G. C. Lewis, *Government of Dependencies*, p. 13—prefer to use to denote the functions that I call "executive," equally implies subordination to some higher authority.

oppression by the executive? I should answer, first, that the need of guarding against legislative oppression undoubtedly exists, and is—as we shall hereafter see—recognised as a fundamentally important consideration in determining the constitution of the legislature.[1] At the same time the legislative danger seems to be less perpetual and pressing: since, as G. C. Lewis says, "there is a great difference between deliberate, universal, and avowed, and unpremeditated, particular, and casual rapacity and injustice. Many governments which habitually act towards their subjects in the most oppressive manner would be ashamed to reduce the maxims by which they are in fact guided into the form of a law, and to publish it to their subjects and the whole civilised world."[2]

It seems then desirable that the executive organ should be not only distinct from the legislature—or at least from that part of the legislature that exercises the function of critical supervision—but also in some degree independent of it: though, as we shall hereafter see, it is not easy to determine how far this independence should go, or by what means it may best be secured. Similarly, the expediency of keeping the judicial organ separate from and independent of the executive may be inferred from what has been already said of the importance of keeping the executive within the restraints of law: since such restraints can hardly be expected to be effective unless the question whether acts done by executive officials are or are not illegal can be referred—in the last resort—to the judicial decision of some organ independent of the executive. Whether this organ should be an ordinary law court, or whether a special court should be established to deal with charges brought against executive officials, will be considered in a subsequent chapter (xxiv.).

The expediency of making the judicial organ distinct

[1] When an assembly, periodically elected by the citizens at large, is a main part of the legislature, we may presume that the desires and alarms of the private persons who may suffer from or fear oppression will find adequate utterance in this assembly.

[2] *Government of Dependencies, Preliminary Enquiry*, p. 30.

from and independent of the legislature is no less obvious, so far as the ordinary legislature is bound to conform to constitutional laws which can only be modified by an extraordinary legislature: since in this case—no less than in that of the executive—the obligation of conforming to law cannot be effectually enforced, unless there is a judicial body independent of the legislature, competent to pronounce on the validity of legislation. How far such constitutional limitations on the authority of the ordinary legislature are necessary or desirable will be hereafter considered. Where there are no such limitations—or none having legal force—the need of separating legislative and judicial functions is less obvious.[1] Still, even in this case, it seems clear that if the two functions are given to the same organ, there will be a certain danger of confusion between them, tending to blur the fundamental distinction between the law as it is and

[1] The summary argument for this separation, repeated by several writers after Montesquieu, appears to be based on the assumption that if the judicature had the power of legislating, any tribunal would necessarily have—or assume—the right of legislating *ex post facto*, and therefore of deciding the cases brought before it arbitrarily. Thus Montesquieu writes, in his famous chapter on the English Constitution, "Si le puissance de juger était jointe a la puissance legislative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire" (*Esprit des Lois*, B. xi. ch. vi.). Similarly, Blackstone says (I. ch. vii.), "Were [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law."—So Paley (*Moral Philosophy*, Book VI. ch. viii.), "It is evident, in the first place, that the decisions of such a judicature would be so many laws; and in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the lawmakers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior force to control their proceedings, these inclinations would interfere with the integrity of public justice." But the identity of *organs* does not necessarily imply a confusion of *processes:* and it seems extravagant to suppose that the judges would avowedly and habitually disregard an elementary principle of justice, viz. that the law by which an act is judged should be law established and promulgated at the time that the act was done; or to suppose that, as a body, they would be blind to the evil consequences of continually altering general rules of law to suit their inclinations in any particular case. Besides, it would obviously be easy to arrange that no single tribunal, but only a collection of tribunals sitting together, should exercise the legislative function.

the law as it ought to be. It is also important for justice that law should be applied according to an established and impartial method of interpretation: and this result is more likely to be secured if those who apply the law are not responsible for laying it down. Moreover, an independent judiciary gives a security that equal justice will be done in disputes between legislators and private persons. Also the advantages of "division of labour" are an important consideration: the work of the judiciary, in an advanced society with a complicated system of law, must require a concentration of energy which will hardly be maintained if the business of legislation is superadded. It may be added, anticipating the result of subsequent discussions, that the kind of organ which—according to the received view in modern States—is best adapted for legislative functions is not well adapted for judicial—or indeed for executive—functions; partly from its size and complexity, partly from its mode of composition.

§ 8. The conclusion at which we have thus arrived—that the work of government should be distributed under three main heads, as Legislative, Executive, and Judicial, each division being allotted to a separately constituted organ—is broadly in accordance with the actual constitutions of modern states: and I shall adopt it without hesitation as determining the main outlines of the structure of government, which will be worked out into further detail in the chapters that follow. I think it, however, important to show that this triple division of governmental work cannot well be made complete. For this purpose, I propose to examine somewhat more closely the meaning of the fundamental terms that we have adopted to denote these organs and functions; in order to ascertain (1) how far the general notions of the functions are clearly distinguishable, and (2) how far the functions, as distinguished, are conveniently separable.

1. Legislation, according to its most obvious definition, is the laying down of general rules, whether for the conduct of members of the community generally or for the members

or servants of government. Now it seems clearly impracticable to lay down that all general rules required for the conduct of subordinate members of the executive must be framed by the legislature; thus depriving the heads or councils that have supreme executive authority in different departments of the power of giving general orders to their subordinates. Hence legislation, as thus defined, so far as it directly affects persons in the service of government—and indirectly other members of the community who have dealings with them—must clearly be shared with the executive. It is, however, possible to restrict the notion of "legislation" to the function of laying down rules directly binding on members of the community other than the servants of government: and we have already seen that it is broadly and generally desirable, for the security of the governed, that the legislative function—in this restricted sense—should be vested in an organ distinct from the executive. But it would be highly inconvenient to lay this down as a principle admitting of no exceptions. Indeed, wherever it is expedient that governmental regulations should be elastic, varying with circumstances, and easily modifiable from time to time in accordance with the results of experience,—as, for instance, in enforcing precautions against infectious diseases—it seems best to let these regulations be determined by the executive organ. On this view, therefore, the executive must have a share of the legislative function, taken in the narrowest sense; and we have already seen that this must also be the case to some extent with the judicature, so far as judicial precedents are held to be binding.

2. It is a less easy matter to distinguish "judicial" and "executive" functions in the work of applying law to particular cases. The functions classed as executive are so multifarious that it would in any case be difficult to give a distinctive general definition of them otherwise than by saying that they are all the governmental functions required for carrying into effect the general rules laid down by the legislature, *except* such as are judicial. This being so, we must begin by framing a definite general conception of

judicial functions. We should, I think, apply the term "judicial" to any proceeding by which a competent authority determines the question whether a person has, by violating a law, deserved a legal penalty, or whether he possesses a certain legal right, or is subject to a certain legal liability, that another disputes with him; and it would be further agreed that in a strictly judicial procedure it is proper that a person accused should have the opportunity of defence before the judicial decision is declared.[1] Now, doubtless, the non-coercive part of executive business has no affinity with judicial business, as thus defined; *e.g.* the purchase of articles for the army and navy, the coining of money, the conveyance and delivery of letters, the maintenance of schools, the economic management of public property. The same may be said, for the most part, of such coercive work of the executive as consists in carrying out strictly judicial decisions; *e.g.* the execution or imprisonment of a convict. But there are other indispensable kinds of coercive interference which have to be performed before or apart from any decisions arrived at by a strictly judicial procedure: and in this region the distinction between executive and judicial functions is liable to be ambiguous or evanescent, since executive officials have to "interpret the law" in the first instance, and they ought to interpret it with as much judicial impartiality as possible.

Consider, for example, the arrest of persons suspected of crime. In England when such arrest is made—as is sometimes necessary—without a warrant, we regard it as an executive act, whereas the issuing of a warrant to arrest is commonly regarded as a judicial act. But neither is strictly judicial, according to the definition above given; and there seems to be no essential difference between the intellectual process by which a constable decides to arrest without a

[1] In England a judicial organ, acting as such, ordinarily deals only with cases brought before it by the executive or by private persons; but this cannot be said to be, even in England, an essential negative characteristic of judicial functions, as it is a judge's recognised duty to deal judicially with any offender whom he finds breaking the law in the presence of the Court, without waiting for the intervention of any third party.

warrant and that by which a magistrate decides to issue a warrant. So again, when an executive official has to estimate the value of an individual's property, with a view to direct taxation, he ought to be guided by precisely the same considerations as would determine the decision of a judge if a disputed estimate were brought before him. So again, in the prevention of mischief unintentionally caused by men, or due to other than human agency, and in the regulation of industries dangerous to moral and physical wellbeing, there are various minor kinds of governmental interference which it is difficult to class decisively as "executive" or "judicial;" —such as the issue of orders to remove or destroy public nuisances and the issue of licenses to follow certain trades. Perhaps we may say that in such cases, where the official has a discretionary power to act or not to act, according to considerations of expediency, the function is properly regarded as executive; but even so, it involves at least a quasi-judicial application of the law, if the power is exercised justly, and with due regard to the private interests affected by it. Further, so far as the rules for the management of convicts undergoing imprisonment are legislatively determined, the executive officials who manage the prisons have to exercise essentially judicial functions in deciding whether and how far convicts are to be punished for violation of rules. Finally, the control exercised by the heads of departments over salaried and dismissible subordinates must involve judicial work, so far as the tenure of office is—legally or practically—on "good behaviour;" since, in inflicting the penalty of dismissal, the superior will have to consider not whether it would be advantageous to get rid of the subordinate, but whether he has committed a sufficiently grave breach of duty; and this judicial work is of course increased in importance when the superior has to apply the specially stringent rules and severe penalties which are held to be necessary in the case of military service.

On the other hand, considerations of particular expediency, similar to those that normally determine executive decisions, are not to be altogether excluded from the processes

of strictly judicial reasoning; for instance, in deciding on the punishment to be allotted to a criminal, it may be a judge's duty to consider whether an example of severity is required at the particular place and time.

It should be added that it would be obviously inconvenient not to give the judiciary some power of issuing executive commands to subordinate officials, with a view to the maintenance of order in their Courts, and to a prompt execution of such of their decrees as are unresisted.

3. Let us now consider how far it is possible or desirable to withdraw from the legislature the power of making decisions, whether of the executive or the judicial kind, on individual cases. In Rousseau's famous theory of the sovereignty of the people, fundamental importance is attached to the separation of this function from that of legislation. The people, he holds, have inalienable supreme legislative power; no law can be binding on a people but such as is the expression of its general will; but the general will, to be really such, must be general in its object as well as in its essence; it must "proceed from all in order to be applied to all;" it "changes its nature" and "loses its natural rectitude" when it aims at an "individual and determined object."[1]

It does not, however, appear possible to attain the ends of legislation without rules that are particular in their application, allotting special duties or special exemptions to particular classes of persons on the ground of special circumstances. And this being so, it does not seem possible, by any constitutional rule, effectually to prevent the legislature from dealing with individual cases if it be disposed to do so; since any individual case is distinguishable from all other cases by a combination of general characteristics; and it would be hardly practicable to lay down that no general rule should be valid if it were not in fact applicable to more than one individual.[2] Nor would it conduce

[1] *Contrat Social*, II. chap. iv.

[2] It may be observed that many important governmental acts are at once general and individual in their effects, according to the point of view from

to real equity to preclude the legislature from making exceptional regulations to meet exceptional cases. Hence, though the principle which Rousseau laid down, regarded as a general maxim for the guidance of a legislative organ, appears to me sound, I do not think that the protection against legislative injustice which he has in view can be completely secured by any definition of legislative functions. For the same reason, if the independence of the executive is to be effectually secured against encroachment on the part of the legislature, it must be by some expedient other than that of confining the legislature to the function of laying down general rules; either the legislature must be precluded from dealing at all with certain administrative matters—such as selection of officials, organisation of the army, peace and war, and treaties with foreign states—or the executive in its turn must have some control over legislation.

Still more clear is it that this distinction between "general" and "particular" decisions cannot be usefully applied to limit the financial control of the legislature over the executive. It is, no doubt, easy to distinguish the laying down of general rules of taxation, as a properly legislative function, from the actual collection of the taxes, or the estimation of private property for the purpose of taxation, which are properly executive. But if the financial control of the legislature is to be effective, it must obviously have the power of examining particular details of the expenditure and appropriating funds to particular purposes.

The need of subordinate executive officials—clerks, messengers, etc.—for the transaction of the business of a legislative assembly, is a point of minor importance, which it is sufficient merely to mention.

4. In the case of the strictly judicial application of law the separation that we are considering is more easily effected.

which they are regarded. *E.g.* the annexation of a new territory is a decision that deals with an "individual and determinate objection;" but in its effect on the inhabitants of the territory it is usually equivalent to a complex system of strictly legislative changes.

However unlimited may be the power assigned to the legislature of modifying the *future* legal rights of the governed, this may be kept quite distinct from the power of allotting punishments or damages for an alleged *past* breach of law; and there seems to be no difficulty in precluding the legislature from exercising this latter power, either directly by a "bill of pains and penalties," or indirectly by "*ex post facto*" legislation. It may be said that this restriction will be merely formal; since the legislature will still be able to inflict on any citizen any injury that it may desire to inflict, only not avowedly as a penalty. But (1) there is no reason why the ordinary legislature should not be constitutionally precluded from ordering certain kinds of injuries—such as death or personal chastisement—to be inflicted on the citizens, otherwise than as judicial penalties; and (2) even if it is not so precluded, the moral restraint of a constitutional prohibition against punishing for past acts is likely at least to prevent the legislature from any invasion of the established rights of individuals which could not be plausibly defended unless regarded as a penalty.

Still, though the withdrawal of judicial functions from the legislature is to this extent possible, and, for the reasons before given, generally desirable, there are certain exceptional cases in which it would be either plainly or probably inexpedient. For instance, if the legislative organ—as is actually the case in modern States—consists in whole or in part of one or more numerous assemblies, it seems desirable to give these assemblies the final determination of penalties for breaches of order at their meetings, with a view to the due maintenance of their dignity and the prevention of organised disturbance of their debates. It has also been widely held that such assemblies should have the power of punishing outsiders for attempts to obstruct or prevent legislation by intimidating legislators or otherwise; that, if representative, they should have the power of deciding contested elections of their members; and that judicial proceedings against highly placed members of the executive or judicial organs should be conducted by the legislature. These, however,

are more doubtful questions, the consideration of which must be reserved for subsequent chapters.

On the whole, the conclusion seems clear that the separation of governmental functions among the organs which we have distinguished as legislative, executive, judicial, cannot, from the nature of the case, be complete, notwithstanding the strong general reasons that we have seen for establishing it. Still, we may say that the business of the legislature—at least in internal affairs[1]—should be *mainly* to modify the general rules of law and determine taxation; the business of the judicature, mainly the judicial application of law to individual cases; the business of the executive, all else that has to be done to carry laws into effect. And we may say that while judicial decisions will almost entirely relate to questions of strict right and duty, executive decisions will be largely determined by considerations of particular expediency, which will but rarely enter into judicial reasonings.

Before concluding this preliminary survey, we have to take note of another distribution of the work of government, which cuts across the lines of division which we have so far been examining: I mean the distribution between central and local organs. In an earlier chapter we briefly considered certain reasons why the operations and effects of government should vary somewhat from district to district within the limits of the same State: we have now to observe that—partly for these reasons, partly on grounds that will be considered in subsequent chapters—it is universally held to be desirable that certain portions of governmental work should be allotted to organs whose sphere of operation is confined to particular local divisions of the territory. As we shall see, the extent of the powers vested in local governments will reasonably vary very much, owing to differences in the internal constitution and circumstances of different political societies; but it is generally held to be desirable that the local executive organs of government should be, at anyrate to some extent, independ-

[1] How far the legislative organ should intervene in the management of foreign affairs is a difficult question, which will be hereafter considered.

ent of the central executive. There will therefore be a need of rules determining the division of functions, laid down either by the ordinary central legislature or else by the extraordinary legislature that has the function of making changes in the constitution. And if it is thought desirable that there should be not only division of functions between central and local governments, but also some supervision of the latter by the former, it may be convenient to constitute one or more special departments of the executive for the purposes of this supervision.

## CHAPTER XX

### THE LEGISLATURE

§ 1. In the preceding chapter we have been led to adopt a threefold division of the functions of government, as (1) Legislative, (2) Executive, and (3) Judicial;—taking legislation to include the imposition of taxes, and, accordingly, combining with it a supervision over public receipts and expenditure. A general consideration of these three classes of functions has shown us reasons why they should be, in modern states generally, performed for the most part by different organs: at the same time we have seen that this separation of functions cannot conveniently be made complete.

Both these conclusions will receive further support from the study of the construction adapted to each organ, to which we are now to proceed. I begin with the legislative organ, because we have already seen that, from the nature of its functions, the legislature must be in a certain way supreme over the other two organs, since it belongs to the legislature to lay down the general rules, which the judiciary has to apply, and in conformity to which the executive has to work; while again, so far as it regulates public finance, the legislature must exercise a general control over all the operations of government that involve expenditure. It has seemed indeed desirable—and almost necessary, if the separation of functions is to be effectually carried out—that the executive and judicial organs should have a substantial amount of independence within their respective

spheres of action: and I shall hereafter consider measures by which the required independence may be secured. Meanwhile, I shall assume that there is in any case a qualified supremacy in the legislature, from the nature of its functions; and that it will consequently be expedient to entrust the legislative organ with the function of critically supervising the action of the executive.

Let us begin, then, by considering the constitution of the legislature.

If we ask—without reference to existing institutions and the habits of thought which they tend to generate—to whom should be entrusted the function of making or modifying laws, an obvious answer is that it should be entrusted to persons who are thoroughly acquainted with the laws that they are called upon to modify. As J. S. Mill justly says, "there is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws: since every provision of a law requires to be framed with the most accurate and long-sighted perception of its effect on all the other provisions: and the law when made should be capable of fitting into a consistent whole with the previously existing laws."[1] Accordingly, we may lay down without hesitation that men who have that thorough knowledge of law which we can, generally speaking, only expect to find in able and experienced members of the legal profession, should have a large and responsible share in law-making. Proposed laws should be drawn up by lawyers, and any changes made in the draft should be carefully revised by lawyers. But, for several reasons, it does not seem desirable to entrust the substantial work of legislation entirely—or even mainly—to them alone.

Firstly, the deductive operation of applying complicated general rules accurately and faithfully to particular cases is very different from the inductive operation of collecting, comparing, estimating, the good and bad consequences of

[1] *Representative Government*, chap. v.

actual laws, and considering the consequences of proposed or possible measures. In either case, a knowledge of law, as it is, is required: but the use made of the knowledge, the habit of mind that it generates, the special points needful to be observed, the special difficulties that have to be faced and overcome, are obviously different in the two cases. Persons, therefore, may be highly skilled by nature and practice for the *application* of law, which is the habitual intellectual work of the judge, and the advocate who has to convince him, without being qualified for the *modification* of law which is the proper work of the legislator. Again, in the judicial administration of law, it is most needful that the judge should have a scrupulous respect for the law that has actually been laid down: that he should resist not only the coarser temptation of warping it under the influence of bribery, intimidation, party feeling, or personal affection, but also the subtler temptation to twist it in the direction of equity and utility;[1] since, as each judge would be likely to twist it somewhat differently, the certainty of law, which is more important than any increase of equity that could be obtained in this way, would be lost: moreover, if this well-meant warping of rules were allowed, it would be indefinitely more difficult to resist the influence of sinister interests. But this scrupulous reverence for existing law, though a needful habit of mind, is likely to prevent the heads of the legal profession from being unbiassed judges of proposed improvements in law; especially as such improvements are likely to render a certain amount of their painfully gained knowledge and elaborately contrived methods useless, and to impose on them the necessity of learning new rules and new methods. We need not suppose this last consideration consciously to operate as a motive, it is sufficient if it gives an unconscious bias.

Hence, however desirable it may be to give to leading lawyers a large and responsible share in the work of

[1] When an established rule of law is found to be ambiguous or indefinite, considerations of equity or utility may reasonably influence a judge in applying it; but not so far as it is clear, even if it clearly needs change.

constructing laws, they are commonly more qualified to be *builders* than *architects* in this work.[1] The ideal legislator ought to know law as well as the lawyer, but he ought to know much more than law. He must have an insight, as I have said, into the actual relation of the laws to the social life of the community regulated; the manner in which they modify the conduct of the individuals whom they affect; the consequences, proximate and remote, that are likely to result from any change in them. To obtain this insight he ought to have such an acquaintance with particular facts as it is difficult to obtain otherwise than from actual experience, or at least intimate converse with men of experience: and he ought also to possess such knowledge as is obtainable of the general tendencies of social development and the effects of different social causes. Taking men as they are, we shall hardly expect to find many whose knowledge qualifies them for dealing in a statesmanlike manner with all the problems presented to a modern legislative body: if so, it becomes important in constructing our legislative organ to aim at including an adequate selection of persons who, with general ability, combine special experience in different departments of social life. This, then, is one argument for the representative system, as now applied in most countries that share West-European civilisation; that the periodical election of legislators by different divisions, sufficiently numerous, of the whole community, tends to give us, if not ideal statesmen, at any rate a body of men who possess in the aggregate the special empirical knowledge that is most indispensable.

But this is not the sole argument for making an assembly thus chosen a main part of the legislative organ: nor is it generally thought to be the most important argument. It seems even more needful to secure in legislators a keen

[1] It may be added that, as in modern states the branches of law in which ordinary legal practice lies, have reached, for the most part, a tolerably stable condition, the bulk of new legislation relates to matters which come but little in the way of an ordinary practitioner. The advantage of his special training comes more often through the habit it gives of exactly estimating the force of expressions; *i.e.* it bears on the form more than on the matter of legislation.

*concern* for the interests of the various elements of the community for which they legislate: and this is likely to be attained by the system of popular election for a limited time more effectually than by any other mode of appointing a legislative council or assembly. For, provided that the post of legislator is made adequately desirable, either by the remuneration or the power and social dignity attached to it, the desire of re-election will make it the interest of the legislator to promote at least the recognised interests of his constituents.

Here I may point out the fundamental connection between the main principle of the civil code, as constructed on the basis of individualism, and the principle of governmental construction just laid down. We have before seen that legislation and other governmental interference, in modern civilised societies, is mainly based on the principle that the interests of the sane adult members of the community will be best promoted if they are left to provide for themselves; owing to the combination of better knowledge with greater concern for their own interest, which may on the average be attributed to them: it is for a similar reason that, so far as legislative interference is required, a council or assembly chosen for a limited time by the people at large is held likely to know what the people at large want, better than any council otherwise appointed, and to be more concerned to provide it.

What has just been said of laws applies with especial force to the rules under which taxation is levied. Such compulsory taking of private property for public purposes is a part of governmental interference which governments not adequately controlled are specially tempted to overdo: and it is a procedure of which the excess is specially formidable to the governed. As we have seen, the liability to be deprived of an unknown portion of one's wealth by the tax-gatherer is an insecurity against which it is impossible to give complete constitutional protection to the individuals governed: but the insecurity is importantly reduced if the body that regulates taxation is periodically elected by the

community at large and is thus effectively responsible to them.

But again: even if popular election of legislators does not result in better legislation than any other mode of appointment, it tends to improve the practical effect of the legislation by rendering it more acceptable to the governed. Just as an individual is more likely to conform to the rules of a physician whom he has chosen than of one chosen for him, so a people will be less liable to be recalcitrant against laws made by a popularly elected body. Indeed the historic and current name for such a body—a House or Chamber of "Representatives"—suggests that laws made by it will be commonly felt to have been practically made by the people "represented," and so to have popular weight behind them. This line of argument, however, might be used to support a different conclusion: it might be urged that if our aim is to have laws made as completely as possible in accordance with the wishes of the majority of those who have to obey them, there is no need of the intervention of representatives: the simplest and most effective method of attaining this end will be to give the decision on legislative proposals to the people themselves. And I think that there are strong reasons—which I shall discuss in a subsequent chapter—for adopting this plan to a limited extent under certain conditions: but there is a decisive objection against giving the main work of legislation to the citizens at large: viz. that they lack the requisite knowledge and trained faculties. Legislation is a difficult art, the mastery of which requires such an expenditure of time and energy as the citizens at large—even if otherwise qualified—cannot ordinarily afford. It may be said that this deficiency must equally prevent them from choosing competent legislators; since if one does not know whether a law is good or bad, one cannot tell whether the law-maker is competent or incompetent. I shall hereafter consider the exact force of this objection to the representative system, and the best way of minimising it: for our present purpose it seems sufficient reply that, in the

division of labour which civilisation has brought, ordinary members of a community organised on an individualistic basis have continually to choose experts for skilled work of which the chooser does not understand the methods: and the result is commonly accepted as tolerably satisfactory. Thus—to revert to a comparison already made—most men value highly the control that they acquire, by the free choice of their physician, over the operation of applying drugs to the cure of their diseases; though they know themselves to be wholly unable to prescribe medicines for themselves. I shall accordingly assume for the present that the ordinary work of legislation is to be left in the hands of selected legislators; deferring to a subsequent chapter the discussion of the legislative intervention which it may be expedient to reserve to the people at large.

To sum up: I am prepared to accept, in a certain sense, the proposition—widely regarded as the fundamental principle of the modern constitutional state—"that a man ought not to be made to submit to any laws or to pay any taxes to which he has not consented personally or through his representatives;" but I accept it not as an absolute or ultimate principle of constitutional equity, but merely as a rule based on a generalisation with regard to human nature which I do not maintain to be universally true, and the force of which may be outweighed by other considerations. It still remains open to argument whether the whole, or the greater part of any given community, is not in such an intellectual and moral condition—from lack of intelligence, lack of orderly temper, lack of national cohesion, or other causes—that its interests will be better promoted by a legislature over which it has no control, than by one which it is allowed to elect. All that can be fairly contended on general grounds is, that the burden of proof should be distinctly laid on those who wish to withhold the security for suitable legislation that such control affords. The same may be said of the exclusion of any class of sane adults from electoral privileges, in a community where the representative system is established.

§ 2. The reasons that I have just given for constituting a representative assembly as the whole or chief part of the organ of legislation are those that have usually been most prominently put forward on its behalf. But some writers[1] of repute appear to attach still more importance to what I may call the *educative* effect of representative or popular government. The alleged educative advantages are partly intellectual—the training given by participation in the management of public affairs; partly moral—the "invigorating effect of freedom on the character" in developing patriotism and public spirit, self-reliance and energetic self-help. As regards the first kind of advantage, this argument, if valid at all, seems to make more strongly for the direct participation of the people in legislation than for representative government; since the mere choice of a legislator is not likely to exercise and train the intellect so effectively as the effort to estimate the grounds for and against any proposed law. Still, in proportion as choice implies supervision and criticism of the legislator's work, the argument may be used in favour of either form of popular government. But in neither case can I regard it as a strong reason for giving legislative functions—either directly or indirectly—to persons whose minds are as yet incompetent to perform the intellectual processes required for coming to rational conclusions on the questions with which a modern legislature has to deal. There seem to be but slender grounds for thinking that such persons will receive valuable intellectual training through mere experience of the effects of their decisions; since it requires a certain grasp of the right method of dealing with any class of problems to be able to derive instruction from one's mistakes: and the political blunderer can generally, without manifest absurdity, attribute the bad consequences of his blunders to circumstances incapable of being foreseen, or to the perversity and stupidity of other men.[2]

[1] *e.g.* J. S. Mill, *Representative Government*, chap. iii.

[2] It would be satisfactory to feel confident, with Story (*Constitution of the United States*, Book III. ch. ix. § 575) that the representative system, by

The argument based on the *moral* advantages of "free" government seems to me to have more weight; but the consideration of it brings again before us the confusion which the common use of the word "Freedom" is apt to cause.[1] When a writer speaks of "Free" institutions he sometimes means to imply that the government leaves the individual alone to look after his own affairs; sometimes that the private members of the community exercise an effective control over the government: sometimes he seems to imply both together, apparently assuming a necessary connection between the two facts, which we may conveniently distinguish as "civil" and "constitutional" freedom respectively. But there is no certainty that a representative legislature, chosen by universal suffrage, will not interfere with the free action of individuals more than an absolute monarch would: the essential difference is merely, that under absolute monarchy a majority of sane adults may be forced to submit to laws that they permanently dislike, whereas if a popularly elected assembly is supreme in legislation, this coercion can only be applied to a minority. To this extent constitutional freedom affords a security for civil freedom; but *a priori* reasoning and experience combine to show that there is no further necessary connection between the two. For instance, I understand that Government does nothing to prevent a man from getting as drunk as he likes in Russia: whereas the vigorous democracy of the United States has established severely restrictive liquor-laws.[2]

awakening "a desire to examine and sift and debate all public proceedings," must tend to "gradually furnish the mind"—of the mass of the electorate—"with safe and solid materials for judgment upon all public affairs;" but I know no adequate grounds for this optimistic conclusion.

[1] Cf. *ante*, chap. iv. § 1.

[2] I may observe that the confusion of thought which hangs about the notion "freedom" becomes still worse confounded in the case of the term "liberal," by blending with the notion of "liberality" in the sense in which it is opposed to "meanness:" so that the term "liberal" comes to be applied not only to measures which secure to individuals civil freedom, or extend popular control over government, but also to measures which spend public money without stint. Both these confusions are effectively exposed in Mr. Bruce Smith's *Liberty and Liberalism* (1887).

Distinguishing, then, between constitutional and civil freedom, I think we may fairly infer, from our general knowledge of human nature, that the possession of the former will tend to develop patriotism and public spirit. *Ceteris paribus*, a man who has a share in the management of public affairs is more likely to feel that they are his own affairs, and to exert himself, and make sacrifices when required, to promote the welfare of the state. But there is no similar reason why constitutional freedom should make individuals more self-reliant and self-helpful in the management of their private affairs: indeed, it even seems rather paradoxical to say that the best method of rousing persons to energetic effort in the promotion of their private interests is to give them the interests of other persons to look after, and to hold out to them the hope of persuading or compelling Government to improve their circumstances. On the whole, therefore, while I admit that active, self-helpful, self-reliant peoples are most likely to have some system of popular control over their government in effective working, I am rather inclined to regard it as generally true, that a people of this kind will want a share in their government and will agitate till they get it, than that the exercise of the franchise will tend to give them these qualities. In any case, when a nation of this kind has once obtained the control over legislation, which is given by the establishment of a representative legislature, it is likely to be very difficult to bring it into a condition of permanent general contentment with any legislature that has no popular element:—at least until it has had prolonged and bitter experience of the disasters arising from popular government. What we have practically to consider in laying down principles of constitutional law for such a nation is not whether it is to have a representative assembly as a main part of the legislative organ, but in what way the deficiencies of such an assembly may best be remedied or minimised.

§ 3. In examining these deficiencies and the remedies proposed for them we shall be led naturally to the consideration of the proper modes and conditions of the election

of legislators. Hitherto I have spoken of them as elected by divisions of the community, assuming vaguely that these divisions would include all sane adults, who are not disqualified on special grounds. And it is obvious that the general arguments for a representative legislature lead *primâ facie* to this conclusion: if any class is deprived of representation, the advantages aimed at in the institution are lost so far as this class is concerned. Indeed there may be even more danger that the special needs of such a class will be neglected and its special interests sacrificed, by a legislature representing other classes exclusively, than there would be under a despotism; since a despot has less motive than an assembly representing only a portion of the community for dividing unequally any natural concern that he may feel for the interests of those whom he governs. This is the fundamental objection to any attempt to improve the quality of a representative legislature by restricting what is called the "suffrage," "franchise," or "active" electoral privilege —*i.e.* the right of voting, as distinct from the right of being voted for—viz. that it sacrifices *pro tanto* the special advantages at which representative government aims. A further objection lies in the sense of injustice that such an excluded class is likely to feel in consequence of its unequal treatment.

Still these objections are not decisive, from a utilitarian point of view: they may be outweighed by special proof (1) that the class in question will not suffer by exclusion because its interests will be adequately cared for by the representatives of those included, or (2) that it is likely to make a dangerously bad use of the vote. The first of these arguments obviously only neutralises a part of the grounds for universalising the suffrage; it does not affect the "educational" grounds. It has some force in the case of women, owing to the intimate relations of affection that bind them to men: it may be plausibly urged that the political interests of wives, daughters and sisters, are safe in the hands of husbands, fathers and brothers. The argument, however, is obviously least applicable to the considerable minority of adult women

—spinsters and widows—who are thrown on their own resources for a livelihood: and it is not supported, even in the case of wives, by the practice of the wealthier classes in framing marriage-settlements, since elaborate care is usually taken to protect the pecuniary interests of the wife against the misconduct of her husband.[1] I do not know any other important class of sane adults in whose case the argument —so far as it is used to justify lifelong exclusion—is even plausible in a modern state.

The second argument, therefore—that the excluded class will make a dangerously bad use of the vote—is the more important; and it seems worth while to examine in detail the different species of such misuse that are chiefly dangerous.

Firstly, this bad use may be (*a*) morally perverted, or (*b*) merely intellectually mistaken. Of the former misuse the three chief kinds are caused respectively by intimidation,[2] bribery and dishonest demagogy. The patriotic voter will obviously vote for the candidate whom he regards as most competent to promote the wellbeing of the community by legislation; but it is in accordance with the general principle on which representative government is based, that in estimating the candidate's competence he should have particular regard for the special political interests of the section of the community to which he belongs, and aim especially at securing an intelligent concern for these:—though he ought, of course, not to desire that these special interests should be promoted at the expense of justice and the common good. Now if the elector is in such a position that a candidate or his friends may seriously injure him without open illegality and without material

[1] It is sometimes urged that women who are thrown on their own resources do not form a distinct economic and social class, like landlords or artisans; so that their interests may be adequately represented by men of the same class. But we cannot assume either (1) that women are not more fit for some lucrative occupations than for others, supposing all to be equally open to them, or (2) that they are not in danger of being excluded from some lucrative occupations, in the interests of men.

[2] By "intimidation" is here meant the threatening of conduct that would be in itself legal, apart from its aim of influencing the vote of the person threatened. See chap. iv. § 4, pp. 59, 60.

sacrifice to themselves—it is obvious that his private interest may be artificially weighed, by fear of dismissal, loss of custom, etc., so as to induce him to vote for a candidate whom he does not really trust as a protector of his political interests. In this case the vote is perverted by *intimidation*: which must be carefully distinguished from what Bagehot has called the "habitual deference" which sometimes leads persons of humble social position to vote in accordance with the judgment of those above them in station: since this sincere deference to the opinion of the rich and powerful, though it may be mistaken, is not demoralising.

Again, if the elector is poor, his concern for his political interests may be similarly outweighed by a bribe which the candidate or his friends may afford without material sacrifice. This, of course, is all the more probable in proportion as the elector is unenlightened as to his real political interests: still, it cannot be said that the danger of bribery proceeds entirely from unenlightenment; since it may easily be that the probable difference, as affecting his private interests, between the kinds of legislation offered by competing political parties ought reasonably to be valued at less than the £5 note which the candidate is willing to offer. But the object of giving him a vote is not simply to secure his private interests, but to secure the presence in the legislative organ of the varied knowledge and intelligent concern for all sections of the community that is necessary for good legislation: and this aim is defeated so far as the elector yields to bribery.

It is, however, a still worse form of bribery if the candidate tempts the elector with promises to further his political interests by legislation which both know to be contrary to the general good: since against the candidate who merely bribes pecuniarily we have only a certain general presumption that he is not likely to be a good legislator, but a candidate who bribes by promising mischievous measures has definitely pledged himself to be a bad one. This third perversion of the vote I call *dishonest* demagogy.

It is to be observed, however, that even where the

demagogue is dishonest, the elector may be honest but mistaken: he may believe that the legislation promised him is just and conducive to the common good, and may vote legitimately according to his lights. Or, again, the demagogue who is promising to further the sinister interests of a class may himself be honest but mistaken: he may be a charlatan who genuinely believes himself to be a statesman. The danger that under a widely-extended suffrage the ultimate interest of the community may be sacrificed to the real or merely apparent interests of the numerical majority may occur through any of these modes of demagogy; and in a community not radically demoralised the danger from the two latter modes is likely to be much greater than from dishonest demagogy recognised as such.

Now intimidation may be partly prevented by the secrecy of the ballot; and the importance of preventing it is, in my opinion, a decisive argument for secret voting in spite of the strong objections that may be urged against it.[1] Still, this prevention cannot be made complete, since in many cases the way in which an elector has voted may be inferred, with a high degree of probability, from his own words and actions or those of others; and if there is a strong probability that a particular class will vote in a particular way, such a class, when in a small minority, incur nearly all the risks of openly voting against their opponents by venturing to go to the ballot-box. Bribery, again, may—more easily than intimidation—be partly put down by penalties: but the difficulty of legally preventing an exchange into which both parties are desirous to enter is shown by experience to be very great in private transactions, and it is therefore likely that the purchase of votes will always go on to some extent. Nor is it probable that any efforts to disseminate truth and sound reasoning are likely to put down demagogy altogether. Hence it must be recognised as possible that on these grounds the disadvantages of giving the suffrage to poor, dependent, and ignorant persons may outweigh the disadvantages of excluding them.

[1] See, for instance, Mill, *Representative Government*, chap. x.

Whether this is likely to be the case at any particular time and place it does not belong to general theory to decide. The decision will partly depend on a consideration which I have not yet taken into account—the intensity of the desire to exercise the franchise felt by the excluded class. For where this desire is weak, not only is the danger from exclusion less, since this cannot cause much discontent; but the danger from inclusion is greater, since persons who have no genuine consciousness of political interests needing defence lack the normal motives to legitimate voting, and are therefore more in danger of perversion. If their political interests do not really suffer by their exclusion, the most pressing reason for giving them a vote vanishes: if their interests do suffer, and it is only the consciousness of their need that is wanting, it is a case for agitation rather than immediate enfranchisement.

§ 4. In any case I think that the permanent exclusion of any class of sane self-supporting adults, on account of poverty alone, from the share of the control over legislation which the representative system aims at giving to the citizens at large, is invidious and difficult to maintain. There is more to be said for imposing such an exclusion on avoidable ignorance of an extreme kind: *i.e.* refusing the suffrage to persons who have not attained a certain educational standard;—provided that facilities for education are within the reach of all classes. Various other exclusions are permanently defensible on different grounds. Thus it seems reasonable to withhold the suffrage — partly as a deterrent, partly as a security against its perversion—from persons who have committed grave offences of any kind; also from all who have been convicted of buying or selling votes, or intimidating electors. In some cases, disgraceful conduct not amounting to crime seems a sufficient ground for exclusion—*e.g.* the keeping of a brothel, where this is tolerated. I also hold it to be reasonable to disfranchise persons who without crime have demonstrably failed to maintain their economic independence—*i.e.* paupers, and bankrupts who have not paid their creditors in full: on the ground that,

by becoming a burden on society they have forfeited their claim to the vote as a protection of their private interests, while their influence on current politics is not likely to be advantageous to the public. Other temporary exclusions appear to be desirable for reasons that involve no sort of discredit. Thus, I should advocate an inferior limit of age somewhat higher than that of ordinary legal maturity; since it is reasonable that a man should not have a share in the control of public affairs until after some years of the experience gained by the independent management of his own affairs; and there seems to be no material danger that the persons excluded by youth would suffer through a sacrifice of their interests to the interests of older men. Further, when we examine the possibilities of bringing the motive of private interest into illicit operation in political elections, we are led to distinguish a special class of persons in whose case this operation cannot effectually be excluded, except by a partial withdrawal of the right of voting. I mean persons employed by candidates or their friends for the work of an election: it seems difficult to prevent the remuneration for such employment from practically operating like a bribe, if the employees are allowed to vote in the same election. A similar danger exists in some measure in the case of permanent employment, private or governmental: but not such as to justify a sweeping disfranchisement of employees. There is, however, a special ground for excluding from the exercise of the suffrage such employees of government as are charged with the function of physical coercion—policemen or soldiers on active service—on the score of the peculiar importance of keeping them impartial in political conflicts: if, at least, there is a serious danger of disorder being caused by the violence of political partisanship. The withdrawal of the vote in this last case would also prevent the distribution of the army from being manipulated for electoral purposes: and it would be less likely to be felt as a grievance, since any portion of the army that is abroad must be excluded from voting.

It must, however, be admitted that the disfranchisement

of soldiers, if it is felt as a grievance, may be especially dangerous, as supplying a motive to the soldiery to use their physical force in a revolutionary way for the satisfaction of any demands that Government may refuse.

A question of still wider importance is raised by exclusions on the ground of sex or race. I see no adequate reason for refusing the franchise to any sane self-supporting adult otherwise eligible, on the score of her sex alone; and there is a danger of material injustice resulting from such refusal, so long as the State leaves unmarried women and widows to struggle for a livelihood in the general industrial competition, without any special privileges or protection. The arguments for enfranchising married women appear to me less strong, and the objections more serious. If a husband is not abnormally wanting in domestic affection and the sense of domestic duty, the interests of his wife, in social and economic relations generally, are tolerably safe in his hands: while, if he is so wanting, he is likely to have little scruple in exercising on her a kind of intimidation which law is powerless to prevent; so that she will derive little benefit from enfranchisement, except through deception that is likely to be demoralising. Even apart from intimidation, a wife's political judgment is likely to be biassed by the desire of domestic harmony, prompting her to avoid political disagreement with her husband. Moreover, according to the customary division of labour between husbands and wives, the experience of the latter will, generally speaking, be of less value as a preparation for the wise exercise of the franchise.

Exclusion on the ground of race alone may be expedient if the general intellectual or moral inferiority of the race excluded is sufficiently clear. But a political society in which such exclusion is an important question, will be necessarily different from that which has been generally contemplated in the discussions of the present treatise, and will be likely to require different laws in other matters besides the franchise.

The exclusions that we have been considering bring

strongly before us the different meanings which may be attached to the word "citizen." In its widest sense it is simply opposed to "alien," and would include all members of a state in which slavery is not allowed: but in states in which the government or an important part of it is elected by a widely extended suffrage, it is not uncommon to mean by the "citizens" only those who have a right to vote in such elections—leaving out of sight the usually larger part of the community that has not this right. The word "people" is also used in the same restricted sense by those who speak of "government by the people." It is convenient to use both terms in this signification, and I shall allow myself to do so without further explanation where the context excludes ambiguity; when there is a danger of ambiguity, I shall speak of "electors" and "electorate."

§ 5. We have seen that any restriction of the suffrage involves a *primâ facie* danger that the interests of the unenfranchised class will be sacrificed to the interests of the enfranchised. In pointing this out, I did not mean to imply that good legislation is a kind of bargain struck between conflicting class-interests: it is the interest of the whole which includes justice to all the parts, at which the statesman should aim: and justice, as Mill says, consists in giving a man not the half of what he asks, but the whole of what he ought to have. But good legislation is a result more likely to be attained in a representative assembly in which such class-interests are fairly balanced, as each class is more open to sound reason and impartial consideration of the common good where the interests of others are concerned. For this reason, as we have seen, a widely-extended suffrage involves a danger of a different kind: viz. that the ultimate interests of the whole community may be sacrificed to the real or apparent interests of the numerical majority of the electors, either through ignorance or through selfishness and limitation of sympathy.[1] Nor do I think that this danger can be adequately

[1] I leave it doubtful whether this effect is due to moral or intellectual causes; because, on the one hand, it does not seem to me legitimate to assume

met by any such exclusion from the franchise, on the score of poverty and ignorance, as I should hold to be permanently defensible. But there are various ways[1] of partly obviating it which do not involve the exclusion of any class from the franchise. One of the simplest is to distribute votes so as to give the wealthier or more cultivated classes, as such, a share of electoral control out of proportion to their numbers. This end may be attained either (1) by dividing the community into classes, according to the amount of their income, or education, or both combined, and allotting to the higher classes a larger proportional number of representatives than to the lower; or (2) by giving more than one vote apiece to the wealthier or more educated electors.

Neither of these expedients, however, has been generally adopted in recent constitutions: partly no doubt from the strong offence that both give to the popular sentiment in favour of political equality. But there are other objections, besides the merely sentimental one, to this artificial balancing of the electoral weights of different classes. In the first place, it is impossible to divide society into classes which remain identical and equally distinct for all legislative purposes: as we pass from one proposed law to another, we find that the important lines of division are continually changing. In England, *e.g.*, for some purposes we have the "agricultural" opposed to the "manufacturing interests"; sometimes, again, the conflict of interests is between manual labourers generally and their employers, sometimes between persons to whom fixed money-payments are due and the rest of the community: and no one of these oppositions coincides importantly with either of the other two. Secondly, such measures have not only an invidious appearance of aggravating the natural inequalities of a modern industrial society by

a complete and universal coincidence between the real ultimate interests of all classes and sections of the community, and the real ultimate interests of the whole community; while, on the other hand, it does not seem to me possible to disprove this coincidence.

[1] The most widely-adopted method is to give wealth and culture a separate representation in a Senate or House of Lords, side by side with a House of Representatives. This will be discussed in a separate chapter (xxiii.).

adding artificial political inequalities to correspond, but they may cause a real injustice corresponding to this appearance. It not merely *looks* as if A, being twice as well off as B already, had his superiority still further increased by the allotment of twice as much control over legislation; but, in fact, if a conflict between opposing interests of different classes does arise, there is a real danger that the less prosperous majority may be sacrificed to the more prosperous minority.

Further, we must recognise that, even without a formal advantage in voting power, men of wealth are likely always to count practically for more than one vote each. We must recognise, as was before said, that bribery cannot be completely prevented: nor, probably, even intimidation. And even without definite bribery, gratitude for liberality, private or public—and vague hopes of similar liberality in the future—will be motives operating on the side of wealthy candidates, or candidates with wealthy backers. The superior education of the rich must also have some weight. Even the mere prestige and distinction which wealth gives seems to be an important force in some states of society: though hardly, I conceive, when habits of independence and combination are fully developed among the poorer classes.

These considerations somewhat reduce the danger that a widely extended suffrage *primâ facie* involves, of legislation in which the interests of the rich minority are sacrificed to those of the poor majority in a manner disadvantageous to the community as a whole. Still they do not lead me to regard the danger as immaterial; and it is, I think, likely to become more formidable in the future history of Western Europe and America than it has been in the past: since we have not yet seen the working of a thoroughly organised democracy, with a strong urban element, in a crowded country with very marked contrasts of wealth and poverty. The consideration of this danger suggests an argument for keeping the office of legislator unsalaried, so that the class of persons who possess a moderate amount of wealth may have a practical influence on legislation out of

proportion to their numbers. This point, however, will be more properly discussed later, when we consider the conditions of eligibility for the representative assembly.

§ 6. I pass to consider how the community is to be divided for the purpose of obtaining the various sections which are to be separately represented in the legislative assembly. Local divisions are most obvious and natural: but reflection shows that they involve the practical disfranchisement, in each locality, of a minority that may amount to nearly one-half: and even in the case of the majority the candidate may be only taken *faute de mieux* by a great many of those who vote for him. These conditions tend to intensify the danger signalised in the preceding section; since they render it not improbable that under a widely-extended franchise the minority enjoying comfort and culture will be represented by a still smaller minority in the legislature. Hence it has been suggested that, in order to obtain a truer representation of different interests and opinions, the formation of constituencies by free combination, independent of locality, should be allowed. This suggestion has been worked out by Mr. Hare [1] into an elaborate scheme: the advantages of which, both as a more complete realisation of the fundamental principle of representative government, and as a security against the dangers of a widely extended suffrage, are urged by its advocates with much force and enthusiasm of conviction. It appears to me, however, to be open to the following serious objections:—

1. There is a danger of losing a valuable protection against demagogy, if we remove the natural inducements which local divisions give for the more instructed part of the community to exercise their powers of persuasion on the less instructed. If the divisions are local, the wiser few in each locality, in order to carry the candidate of their choice, have to convince their neighbours, and thus the natural sociability springing from neighbourhood tends to become a channel of political education: but if an instructed minority were allowed to combine with others on their own intellectual level elsewhere, this valuable educative influence would

[1] See *The Election of Representatives*, by Thomas Hare.

tend to be lost. This consideration seems to me materially to reduce the probable efficacy of the representation of minorities as a prophylactic against the danger of pernicious class-legislation.

2. Though it is the aim of the representative system to secure intelligent concern for the special needs of different classes and sections, it is hardly desirable that each representative should represent *exclusively* one set of particular interests or opinions: we want for legislators men of some breadth of view and variety of ideas, practised in comparing different claims and judgments, and endeavouring to find some compromise that will harmonise them as far as possible. For a compromise of this sort is largely the kind of result to which the deliberations of the assembly as a whole ought to be directed: it is well, therefore, that the members of the assembly should be persons qualified to find it. Now it certainly seems to me that this is likely to be less the case if the community is not locally divided for electoral purposes. If the citizens are left to aggregate themselves into constituencies by free combination they are likely to form electoral bodies of a more uniform character, whether the combination is based upon identity of interests or similarity of opinions. The legislators will tend to represent either particular trades or professions, or particular religious sects or other associations, tending to be somewhat fanatical, of persons combining to effect special legislative ends—total abstainers, anti-vivisectionists, anti-vaccinationists, and the like: unless —as is possible—the result should be a more elaborate organisation of the great political parties, in which they would be subdivided into constituencies by a central committee, so that the elector's freedom of choice would disappear.

On these grounds I am opposed to the introduction of Mr. Hare's, or any similar, scheme for the representation of minorities, as applied to the country as a whole. But granting that the principle of local divisions be adopted, it still remains to be considered how the divisions are to be formed. The simplest plan is to divide the country into as many approximately equal parts as there are to be members

in the representative assembly, so that each such part may elect one member: and the simplicity of the plan is an undoubted merit, since any more complicated arrangement is through its complexity more liable to inequalities tending to become grievances. It has, however, been urged[1] as a strong objection against this plan that it gives too much advantage to a candidate of *local*, as compared with one of *national* reputation: so that it leads to the election of less distinguished men as legislators. There is some force in this argument; but the drawback urged seems likely to tell rather against the lesser than the greater luminaries; since a statesman of great national reputation could hardly fail to command a majority in some one small division, unless he were so generally unpopular that he would be likely to be rejected by the majority in a larger division. And, obviously, what I have regarded as the main aim of the representative system—to secure in the legislature adequate knowledge of and concern for the various needs and interests of different sections of the community—is, *ceteris paribus*, more likely to be realised the more numerous the electoral divisions are. On the other hand, the simplicity of equal divisions is artificial, and involves the disadvantage of breaking up for electoral purposes portions of the community,—such as towns generally are,[2]—which tend to have an intimate internal coherence in their economic and social life, and consequently important common interests. Generally speaking, to understand adequately the legislative requirements of any division of a town, a man must have a grasp of its economic life as a whole; and this is a strong reason for arranging that the representatives of a town—or any other naturally distinct and internally coherent parts of the country—should represent it as a whole. If, however, the electoral divisions are thus made to correspond as far as possible to natural divisions, there will in many cases be divisions which will

[1] This argument has been much used in the recent controversy in France between "scrutin de liste" and "scrutin individual" or "d'arrondissement."

[2] The capitals of large states should perhaps be excepted, as liable to lack the internal cohesion on which stress is here laid.

require to be represented by several members: so that the question will arise again whether all the members of each electoral division should be elected by the majority—each elector voting for all—or whether some representation of the minority should be devised, by Mr. Hare's scheme or otherwise. In this more limited application the advantages of minority voting seem to me to outweigh the drawbacks.

Whether the *simplest* or the most *natural* principle of dividing electoral districts be adopted, it is important to provide for a rectification of the division from time to time, to meet changes in population. Such a rectification is not to be regarded as a constitutional change: it should be performed regularly, as a natural consequence of a periodical census; and where party government prevails, it will be better that it should not be performed by the legislature but by a permanent commission—in order to avoid or reduce the danger of "gerrymandering." [1]

§ 7. So far I have been considering the possibility of improving the quality of a representative legislature by limiting or somehow modifying the right to vote. I pass to consider restrictions on the right to be elected. These will reasonably coincide to a great extent with the limitations on the "active" right. Thus crime, infamous trade, loss of economic independence, extreme poverty and ignorance, should disqualify equally in both cases: and if a minimum of age higher than that of ordinary legal maturity be adopted for electors, it will be reasonable to put the same restriction on candidates.[2] Other important limitations—such as the incompatibility of legislative functions with employment in the executive departments—will be more

[1] "The aim of gerrymandering is so to lay out the [electoral] districts as to secure in the greatest possible number of them a majority for the party which conducts the operation. This is done sometimes by throwing the greatest possible number of votes into a district which is anyhow certain to be hostile, sometimes by adding to a district where parties are equally divided some place in which the majority of friendly voters is sufficient to turn the scale."—Bryce, *American Commonwealth*, Part I. ch. xiii. p. 165.

[2] I see no adequate reason for adopting a higher minimum of age in the case of the elected than in that of the elector—as is done in several modern European constitutions.

conveniently considered in a subsequent chapter.[1] Apart from these, the most important question under this head is whether it is desirable to require a legislator to possess property or income considerably above the minimum—if any—imposed as a condition of exercising the franchise. There are weighty arguments both for and against such a regulation. On the one hand it is fairly urged that legislation is an art that can hardly be fittingly undertaken except by persons of high intellectual culture: and that only those whose income is above the average are likely to have had the time and means necessary for the acquisition of such culture. On the other hand it may be replied that legislation is an art that is yet in a very rudimentary condition, in respect of the application of science and systematic method: that the knowledge and intellectual training, really useful for purposes of practical politics, which an ordinary legislator from the ranks of cultivated society has obtained from schools and colleges and books, is not very important in extent; nor beyond what an intellect of exceptional vigour can acquire in any class of society, in spite of the disadvantages of a short education and a life spent in manual labour. It may be urged further that the limitation of eligibility to a minority of comparatively wealthy persons is incompatible with an adequate realisation of the general aims of representative government: since, in order to obtain the varied empirical knowledge and the sympathetic insight into the needs of all sections of society, which we saw to be the characteristic merit of this form of government, it is necessary that every class of electors should be free to choose its own members. Moreover, the limitation must have a tendency to diminish the interest taken by the poorer classes in the election of legislators, and to weaken their confidence in the legislators elected.

These arguments seem to me very strong against any formal and rigid limitation of eligibility: but I do not think that the objection has anything like equal weight as against

[1] See chap. xxii. on "The Relation of the Legislature to the Executive."

a constitutional arrangement which without excluding any class would yet, *ceteris paribus*, operate very decidedly in favour of a candidate of independent means. Such a result, I conceive, may be simply attained by keeping the post of legislator unsalaried. In this case, it will still be possible for any class in the community to concentrate its voting power on candidates selected from its own body: only the electors will have to tax themselves to support their representatives; and they are not likely to do this unless they have a very decided preference for them as compared with wealthier candidates. It may be said that this is unfair to the poorer classes, who will have to tax themselves in order to be represented by members of their own class, while wealthier persons are so represented gratis. But the tax will be comparatively trifling, in a community of the size of an ordinary modern state: since the salary thus provided should not be large enough to stimulate vulgar ambition, or to enable and encourage the recipient to live in more expensive style than he would otherwise have done: it should be strictly limited to compensation for the earnings that he has to forgo and for any quite inevitable expenses entailed by his new position.

It may, indeed, be necessary to provide public remuneration for the work of legislation in poor communities, in which it would be difficult without payment to find fit persons to undertake it. But in societies as wealthy as modern states generally are, it cannot be difficult to find an adequate number of persons, qualified by nature and training and enjoying pecuniary independence, to devote themselves to this important and interesting work: which, if public opinion is in a healthy state, they will regard as at once a duty and an honour. And if the representative assembly is in the main composed of such persons, another very important advantage will be gained: it will tend to maintain a higher standard of pecuniary incorruptibility than would, *ceteris paribus*, be likely to be found in an assembly of paid professional legislators,—unless they were paid much more highly than has ever been proposed. I do not mean that it would ever be possible—or

desirable—to compose a legislature entirely of persons whose mere wealth renders them unlikely subjects for corruption: but in a body whose members are to a great extent drawn from this class it will generally be easier to keep up a severe tone of public opinion in reference to the pecuniary temptations to which a legislator is exposed. If, finally, it be said that an assembly in which comparatively rich men preponderate will tend, in framing legislative measures, to have special regard to the class-interests of the rich, I should quite admit the tendency: but so far from regarding it as a drawback, I should—as I have already said—consider it a valuable security for just legislation in a country where the suffrage is widely extended; in view of the grave danger that the apparent interests of the poor, who form the numerical majority, will be preferred to the real ultimate interests of the whole community.

§ 8. We have seen that one of the arguments against the restriction of eligibility just considered, is that it tends to weaken the tie of confidence between the majority of the citizens and their representatives. A similar objection applies against the method of election in two stages which has been adopted in more than one modern constitution; according to which the citizens at large merely elect electors to whom the election of legislators is entrusted. Moreover, where the party-system[1] is fully developed, there is a danger that the double election may be reduced to a cumbrous formality: the intermediate electors being chosen under pledges—or if pledges are illegal, under a stringent though tacit understanding—that they will vote for the candidates of their party. This might perhaps be prevented by choosing the intermediate electors for comparatively long periods, independent of the duration of the legislative assembly: but then the ordinary citizen's sense of control over legislation would be further weakened.[2] It might also be partly

[1] See chap. xxix.

[2] Also, if the intermediate electors were chosen for periods independent of the duration of the legislative assembly, the "appeal to the people" by a dissolution of the assembly—which we shall see to be a cardinal point of the English system of government—could not be effectually carried out.

prevented by giving the immediate electors other important functions besides that of electing legislators:—*e.g.* by giving the election of legislators to organs of local government elected by the citizens at large:—but this would have the drawback of introducing alien considerations into the election of the local governors; since the man who would be preferred as an elector to the central legislature may not be best qualified for the function of local government or may not be willing to undertake it. At the same time it must be admitted that election in two stages has a *primâ facie* tendency to improve the quality of the legislative assembly, if it does not become a formality, and if both parts of the process are performed with independence and honesty of purpose: since the competence of the elected electors must be expected to be greater than that of the average of those who elect them. On the other hand corruption and illicit influence are in some respects more easily applied to the body of intermediate electors than to their constituencies, owing to the smaller size of the former. My conclusion on the whole would be that the plan is not acceptable, except so far as a second and supplementary chamber, designed to be less under popular control than that which is primarily the "House of Representatives," is held to be desirable as a part of the legislative organ. For such a chamber the plan of election in two stages has much to recommend it.

We are thus led to the last of the principal expedients which have been proposed or adopted to obviate the defects of a legislative assembly elected by a widely extended suffrage most simply applied. We have considered five modes of modifying the suffrage:

(1) By restricting the *active* electoral right,
(2) By distributing representatives not in proportion to numbers,
(3) By organising representation of minorities,
(4) By restricting the right to be elected, formally or practically,
(5) By election in two stages.

But there is another quite different method of dealing with the problem, which has been adopted in most modern constitutions—viz. that of placing side by side with the House of Representatives a legislative body otherwise appointed—a "Senate" or "upper chamber." This modification of the constitution of the legislative organ is of such fundamental importance that it seems desirable to reserve the discussion of it for a separate chapter: and, for reasons that will appear in the sequel, I think it best to defer this discussion until we have considered the proper constitution of the executive organ of government, and its normal relations to the legislature.

For similar reasons I shall also defer several important questions connected with the constitution and functions of the legislature: such as (1) how far its powers should be constitutionally limited, either to secure the independence of other organs or on other grounds: (2) whether elections should be at fixed intervals, or at the discretion of the executive or of the constituencies; and if at fixed intervals, how long the intervals should be, and whether the renovation of the assembly should be total or partial: (3) the sessions of the legislature should be continuous through the year, and if not, whether the opening or the closing of legislative sessions should be fixed, or left to the discretion of the legislature, or of the executive: (4) whether the validity of disputed elections should be determined by the assembly itself or by the judiciary: (5) whether the initiation of legislative measures should be formally open to the executive, or to private citizens combining in sufficient numbers, as well as to members of the assembly: (6) whether individual legislators should have any special exemptions, such as freedom from arrest.

§ 9. For the present I shall only assume that, for good government in a modern civilised community, a representative assembly, of which the members are elected for a limited time, should constitute at least an important part of the legislative organ. Let us now proceed to consider briefly the size, organisation, and mode of working of such an assembly.

As we have seen, its proper function is not exactly to frame laws—which should be left to legal experts—but rather to determine the character of the legislative measures to be brought forward, and by an adequate critical deliberation on their details to shape and mould them into the form best adapted to satisfy the complex needs, and to secure from injury the complex interests, of the different classes of citizens affected by them. It is for this function that the representative system has seemed to us specially adapted: and obviously the larger a representative assembly is, the more fully—*ceteris paribus*—its representative character admits of being developed, and the more varied and comprehensive will be the information and experience that it can bring to bear upon the problems presented to it. Moreover, the larger a legislative body is made, the more difficult it becomes for the members to combine successfully for purposes recognised as improper. On the other hand, the enlargement of the assembly beyond a certain point tends to give undue advantage in debate to the less valuable qualifications for oratory, and makes its meetings more liable to lapse into the confusion, impulsiveness, and intemperance of a mob: and it involves the further drawback that the members have greater difficulty in obtaining useful personal knowledge of each other. The most suitable number can only be determined by a rough balance of these opposing considerations; and it will reasonably vary with the size of the community; but we may perhaps take the number (670) of the English House of Commons—the largest of modern representative chambers—as an extreme limit. In any case the whole assembly is likely to be too large a body for the profitable discussion of the details of legislative measures; and the varied knowledge and experience which it may be expected to contain will be more effectively applied to its work if it is broken into committees, to each of which the consideration of certain classes of measures is allotted; the final adoption or rejection of any proposed law being reserved to the house as a whole. Whether the main preparation of legislative business should

be left in the hands of a single leading committee, is a question of which the decision is likely to be influenced by the relation of the legislature to the executive: but this arrangement has important advantages, from a purely legislative point of view, since the concentration of responsibility that it involves is conducive to a systematic and well-considered ordering of legislative work.[1] The initiation of legislation should in any case be open to all members, the House being free to determine to what extent and under what conditions any legislative proposal should be orally debated.

A point of some importance is the determination of the minimum number required either (*a*) for the opening or continuance of debate, or (*b*) for the validity of any decision. It seems hardly desirable to subject legislators to any irksome coercion to attend debates in an advanced stage of civilisation; as the printing-press supplies a means of considering the arguments for or against a legislative proposal, often preferable to speeches. Again, since, in the multiplicity of legislative business, there must be many subjects on which the majority of members would in any case allow their votes to be determined by the opinions of a comparatively small number, it does not seem expedient to make a high minimum of votes or attendance absolutely necessary for the validity of decisions: all that seems needful is to provide that questions are not designedly or accidentally decided in a manner opposed to the real sentiments of the assembly. The simplest way of attaining this result seems to be to arrange that a decision shall be valid however small the number voting, if it is not challenged; but that it may be challenged if the number voting falls short of a certain proportion of the whole; and that, if it is challenged, the decision shall be deferred till a fixed time on the following day, and shall be then decided without debate by a majority of those voting, however small the number may be.

[1] See Mr. Bryce's criticism of the American system, in which there is no such concentration.—*American Commonwealth*, Part I. chap. xv.

## CHAPTER XXI

### THE EXECUTIVE

§ 1. We have seen that the governmental business classed as executive is very diverse in kind. It should include all the measures required for the due protection of the interests of the community and its members in their relations with foreigners, especially the organisation and direction of the military forces of the State; all the actions not strictly judicial required to prevent members of the community from causing injury to each other or to the public interests and to secure their co-operation for common ends, so far as this is not better left to voluntary association; and finally, all the industry required for utilising such part of the wealth and resources of the community as it is expedient to keep in public ownership, and for providing all commodities needed by the State or its members that are not better provided by private industry and free exchange. The extent of the work under these different heads,—especially the last mentioned,—will vary with the circumstances of the community and its political and social habits and traditions; but in all modern States its multifarious nature has led to its distribution into several departments, under separate management for ordinary purposes. Now when we speak in constitutional discussion of "the executive," or "the executive branch of government," we commonly refer not to the whole aggregate of persons engaged in the performance of these functions in the different departments, or even to all who exercise coercive power—it would seem

absurd to speak of the policeman who bids one "move on" as a "member of the executive,"—but to the body or individual that exercises supreme control, within the limits of law, over all these functions, or the most important of them.[1] The first question, therefore, that suggests itself in considering the structure of the executive organ of government is why any such unity of supreme control over all the branches of executive business is required, besides the control of the legislature and the judiciary.

In considering this question we must put out of sight the actual conditions of English government; in which the "Cabinet," formed by the Parliamentary heads of the chief executive departments, is in fact a committee of the legislature, whose work largely consists in first preparing and then carrying through the legislature all important new laws. Let us suppose that this work is done by other committees of the legislature, and that the "ministers" composing the cabinet have merely to manage the executive work of their departments; each making proposals from time to time for such new legislation as seems desirable in his own department, and advising on the proposals that are made by other persons affecting his work, but not otherwise taking part in legislative business. What reason would there then be for controlling the independence of action of ministers within their respective departments, so far as the law left them discretion, further than by the criticism of the legislature, backed by its power of legislative interference?

In the first place, the advantage of such further control is manifest, so far as the work of any one department is so related to the work of another that a mutual adjustment is continually required for the efficient performance of both: since in this case a disagreement in policy between two heads of departments might lead to a disastrous paralysis of governmental activities, and it will be clearly a gain to obviate or materially reduce this danger by placing both under the

[1] It is generally agreed that some functions may be properly placed under the management of local governments; but the question how far these local governments should be independent of central control is one that we have yet to consider.

supreme control of king, president, prime minister, or council. Now it can hardly be said that this intimate connection exists in the case of many departments of executive work at ordinary times: for instance, there seems to be no such need of continuous adjustment between the work of a Ministry of Education and that of a Poor Law Board, or between either and the work of a Ministry of Public Works or of the Post Office, or between any of these departments and the Foreign Office, or the management of the Army and Navy; the idea of a "unity of general policy" to be maintained in the ordinary administration of all these departments would be quite fanciful. Still, there are important cases in which this unity of policy is a continual need;—thus in England questions of foreign affairs have to be constantly considered in reference to their effects on colonial interests;[1] and in other cases collisions and frictions are liable to occur from time to time, which a common control might prevent or speedily remove. But it is especially at grave crises of national existence that the importance of unity of control to secure harmony of action among the principal departments of the executive becomes manifest. Thus, in war, it is obviously necessary that the management of the army and that of the navy should harmonise with each other, and with the management of foreign affairs, and also with that of the financial department,—at any rate if financial pressure should occur. If, again, the war should be complicated by internal disorder or sedition, it would be important that the Home Department should not be at discord with the others. Again, as we have seen, the State must be prepared for exceptional occasions of extreme need, on which law has to be overridden or temporarily suspended by the executive for some great interest of social order or wellbeing; and it seems important that the responsibility of such interference should not rest on a single head of a department.

Secondly, it seems clear that all departments of which the expenditure is important and liable to vary, so far as their cost falls on the national treasury, must be under one

[1] See Earl Grey, *Parliamentary Government and Reform* (chap. iii.).

supreme control from a financial point of view; in order that the demands made by each on the public purse may be duly considered in relation both to the demands of all the rest and the state of the public resources. It does not, however, necessarily follow that this control should be vested in an executive organ: indeed, as the legislature is the ultimate money-granting organ, it seems obvious that the estimates of expenditure and supply for the year—or any other period for which taxation may be determined—should be prepared by a committee of the legislature; and that this should supervise, from an economic point of view, the organisation and working of the executive departments. But such supervision is necessarily difficult and delicate, and its effective performance requires great knowledge of details, concentrated labour, and continuous experience: and perhaps we can hardly expect to find these qualifications in a finance committee of an assembly periodically elected — and thus liable to be changed at short intervals to an indefinite extent —unless it is aided by a permanent executive department, such as the Treasury is in England.[1] Hence it seems probable that the best result will be attained in respect of economy and efficiency together, if the estimate of necessary or desirable expenditure, and the proposals for obtaining funds to meet it, are primarily made on the responsibility of a supreme executive body or individual, representing all the departments.

I shall accordingly assume that—in a unitary state such as we are now considering[2]— all or the most important permanent departments of centralised executive business will be under the supreme direction of one individual or body, to whose decisions the heads of departments and their subordinates will conform: and I shall refer to this depositary of the supreme executive power as the "supreme executive" or—where there is no danger of ambiguity—"the executive."

[1] I do not mean to affirm that the English Treasury, as at present organised, possesses the required qualifications in an adequate degree.

[2] The deeper division of governmental functions that characterises a composite State and its possible effects on the organisation of the executive will be considered later (chap. xxvi.).

§ 2. But before we inquire how this "supreme executive" is to be constituted and appointed, it seems desirable to obtain a general view of the organisation suitable to the whole body of officials employed in executive work;—confining ourselves to the work that belongs to the centralised executive, and leaving the consideration of local executive organs to a future chapter. As we have just seen, the whole executive business will tend to be divided into a number of branches whose interdependence at ordinary times will often be slight. In some cases it may be necessary, for economy of highly skilled labour, to place two or more of such naturally separate branches under one management, even as regards its ordinary routine. But the general aim of a rational distribution of executive work will clearly be to place under a common management, in each department, such portions of public business as have naturally a close connection; either because the efficient performance of one such portion of business is impossible if other portions are performed inefficiently or on independent plans, or because the experience gained in the management of one portion of the business will tend to render the managers more competent to deal with another portion. And in the most important departments this natural grouping of business appears to be now carried out in modern States generally.

Assuming then that the work in each of the departments with which we are concerned requires unity of management for its effective performance, let us consider generally how the officials employed in the work should be appointed, and in what relations they should stand to each other. We may begin by observing that the line between "service of government" and ordinary civil obedience is not to be sharply drawn. As we have seen (ch. xi. § 2), it should be held generally incumbent on the governed to perform occasional services of a personal kind, in aid of the functions of government—such as giving evidence in courts of justice and otherwise assisting in the discovery of crime, giving information for statistical purposes, etc.; and in crises of defensive war or civil disorder all who are capable

of bearing arms may be required to undertake more serious exertions and risks. Again, the skilled labour of professional men not regularly employed by government—lawyers, physicians, men of science, artists — may be occasionally required for special governmental purposes. In the present discussion, however, it will be convenient to leave out of account these occasional services, and only to consider the case of the regular employees of government. And we may further limit our consideration to such officials as have—or probably will have—some share in the function of deciding or advising how the powers entrusted to the executive are to be used; as distinguished from persons who have merely mechanical or menial duties, or the actual exercise of coercive force in obedience to orders, and also from those whose functions, in the ordinary course of things, will remain purely clerical.

Confining ourselves, then, to the higher class of executive functions—to which the term "governmental" would ordinarily be restricted—we may lay down that, as a general rule, the organisation appropriate to executive work must be essentially different from that which has been recommended for the legislature. In constructing the organ for determining changes in the ordinary law of the State, designed to be permanent,—so far as this term is applicable in a progressive community—I have deemed it primarily important to provide that the complex and varied interests and needs of the different sections of the community shall be adequately discussed and duly regarded in the final legislative decisions. For this purpose it seemed desirable to constitute—as the whole or an important part of the legislature—a numerous body of persons having equal voting power, elected and removable at short intervals by the citizens at large. The executive departments, on the other hand, are mostly occupied with the continual accomplishment of particular effects, in accordance with prescribed general rules, or for the attainment of some prescribed end of public utility. Accordingly, executive business may be assumed to have so much general

resemblance to ordinary private business as to render it desirable that the details of the work in each department should be carefully portioned out among subordinates arranged in various grades and classes; and that these subordinates should loyally obey the direction of a single head, or of a body of persons sufficiently small to be able to deliberate easily and rapidly and take prompt and sometimes secret decisions. Hence popular election seems generally undesirable as a mode of appointing even the highest grade of subordinates; partly because it would tend to give the elected official too independent a position: partly because the electors would not ordinarily be good judges of the special qualifications required for the different kinds of work. We may also assume that these posts should not be hereditary or purchasable; since neither birth nor wealth alone affords an adequate guarantee of the requisite qualifications. It would seem, then, to be, as a rule, desirable that subordinate members of the executive should be appointed by official selectors.

Further, we may assume that the work of such subordinates if continuous and laborious will, like most kinds of private industry in civilised society, be most efficiently performed if the main energies of the workers are absorbed in it; and that it will therefore generally require pecuniary remuneration. We can hardly expect that even the higher subordinate posts, involving continuous professional labour, can be made so attractive to men of independent means by the honour and power attached to them that they will be adequately filled if unpaid: though the superior dignity of public business, and a judicious distribution of marks of honour in reward of meritorious service, may enable the State to purchase the skilled labour it requires at a lower price than private employers would have to give. I shall also assume that the services here considered are voluntary. The cases in which there seem to be adequate reasons for making it compulsory to render personal services to Government are chiefly two: viz. (1) where it is important to keep such services out of the hands of a special professional class, (2) and where they cannot

be obtained in sufficient abundance and adequate quality by the method of free contract, except by an expenditure of money which would be a greater burden on the community than the general obligation of rendering such services. The services of jurymen are commonly considered in England to be an example of the first kind: the second case—and, as some think, the first also—is exemplified by the conditions of military service in the ranks in leading European states. These cases will come under our notice in subsequent chapters; meanwhile, neither of these reasons appears to be applicable to the ordinary civil service of the central executive or to commissions in the military service; while we may assume that the special aptitudes and dispositions required for these posts are more likely to be obtained if the work is freely chosen by the workers.

§ 3. It remains to determine the manner in which the official selection by free contract should be made: taking for granted that the selection should be solely determined by evidence of aptitude.

If wrong motives could be excluded, it would seem best that the appointment to any vacancy should be left to the unrestricted choice of the superior official responsible for the management of the branch of work in question; as being the person likely to know most precisely the kind of aptitudes required, and to feel most keenly the bad consequences of a mistaken appointment. And in many cases I do not doubt that this mode of selection would lead to the best attainable results. But in the present condition of average social morality and public spirit, there must be admitted to be a serious danger that the interest of the heads of departments in subordinate posts may not be sufficiently direct and strong to secure that their patronage will not be used to provide for relations and gratify friends. This is to some extent a cause of inefficient work even in private businesses, and is likely to be much more operative in public departments, in which the personal claims of political partisans are likely to be superadded to those of kinship and private intimacy; while the selector's interest in the efficient

working of the department cannot ordinarily be equal to that which private employers of capital have in the working of their businesses. The danger will be greatest as regards the lowest grade of the appointments that we are considering, which will ordinarily be filled by persons not previously employed in the service; especially as, with a view to their ultimate efficiency, it will be generally desirable that they should be appointed young. In this case the large number of the appointments to be filled, and the necessarily low standard of qualification to be applied, will tend to make the business of selection—if conscientiously performed—a laborious and difficult one; while at the same time the importance of a good selection will be less strongly felt than in the case of the higher appointments. To meet this danger it seems generally expedient that the candidates for entrance into any branch of official work, requiring intellectual qualifications that can be effectively tested by examination, should be subjected to an appropriate examination, conducted by a board of examiners independent of the department. The most controverted question is, whether such an examination should merely secure a standard of efficiency, leaving to the head or manager of the branch of work in question free choice[1] among the candidates who are declared to come up to the standard: or whether it should be competitive, and altogether determine the selection. If the former plan is adopted, opportunity is left for the selecting official to secure that the recipient of the appointment possesses, in some degree at least, such qualifications for his post as cannot be adequately tested by examination; and it may be assumed that this result will be to some extent attained. On the other hand, it is also to be expected that personal influences of the kind before mentioned will partly determine the selection, and the expectation of this will probably tend to reduce materially the number and average abilities of the candidates who are conscious of not possessing such means of influence: so that the standard of what I

[1] Whether the choice is exercised *before* or *after* a merely qualifying examination, is not of fundamental importance.

may call *examinable* qualifications in the persons appointed must be expected, generally speaking, to be materially lower than on the competitive system.

A balance between these different advantages and disadvantages cannot, I think, be struck without appealing to specific experience; and it is not unlikely to vary considerably with the varying nature of the work in question. I observe that some writers—as, for instance, J. S. Mill—consider competitive examinations "absolutely necessary." On the other hand, the German civil service—which German writers, not conspicuously blinded by patriotism, confidently affirm to be the most efficient in Europe—is entered by a non-competitive examination: but it is to be observed that this examination is not the sole guarantee of the training of these officials; they are required, generally speaking, to have gone through a prescribed school-course terminated by an examination, and a course at a university or some similar institution.

For my own part, I should be disposed, in the present state of average morality in European countries, to decide for a competitive—as against a merely qualifying—examination as the only generally trustworthy protection against the influence of political partisanship. This may, of course, at a particular place in time, be adequately excluded by public opinion: but I think it dangerous to rely on the moral sanction only. It is, however, quite possible that some intermediate plan of selection, involving an examination neither purely competitive nor merely qualifying, may be found to be on the whole the best.[1] In any case a period of probation will be desirable, at the close of which a novice

[1] One intermediate plan is to select periodically, by open competition, a larger number of candidates than is likely to be required to fill the vacancies occurring before the next examination, and to leave selection within this number free to the heads of departments. Another plan is to require nominations to be made by the latter, considerably exceeding in number the number of the vacancies, and to make the selection among the nominees competitive. Of these two plans the former seems preferable, since selection after competition is likely to be more carefully performed than selection before competition.

who has been found inefficient may be discarded without grave hardship.

In the case of the higher subordinate appointments in the different offices the important qualifications are to a great extent such as cannot be adequately tested by external examination. Here, however, a customary limitation on the discretion of the selecting official is commonly imposed by the claims of existing employees. And since, generally speaking, the most important qualifications for the higher posts are such as tend to be both *acquired* and *manifested* in the performance of the duties of lower posts, it will be usually expedient that the higher posts[1] should be filled up by promotion from the occupants of the lower: not only because these latter will generally tend to have the fitness imparted by experience, but also because the prospect of promotion will tend to make them both more efficient while occupying the lower posts, and better qualified for the higher. Still it seems expedient that mere seniority should not give even a customary claim to promotion to posts where any important intellectual qualifications are required. In such cases it seems best that the head of the department—or other responsible superior official—should have a free choice among duly qualified persons: since, in the case of appointments of this class, the grave and manifest responsibility resting on the official selector, combined with his personal interest in getting able assistance, will be a fair security against misuse of his discretion, provided that his duty of appointing for efficiency alone be clearly laid down. It is especially important that for any appointment requiring faculties or special knowledge for which the ordinary work in the department gives no scope, the selection among outsiders should be customary as well as legal.

§ 4. In the performance of the higher functions in any department a clear division and concentration of responsibility should be a prominent aim: at the same time, in departments where the extent and complexity of the work

[1] I am not speaking of the headships of departments, which will be considered later.

render it expedient to divide its ordinary management among several superior officials, it is obviously desirable that before decisions of importance are taken there should be consultation among the persons who are managing different parts of an organisation for a common end. We are thus led to the question, whether the ultimate control in any department should be entrusted to an individual or to a board or council. The former arrangement tends to have the advantage in energy and decision of management, and also, by securing undivided responsibility, it increases the effectiveness of the criticism directed on the department by public opinion or by the legislature: the latter tends to secure greater circumspection, and a more complete, many-sided, and impartial examination of the considerations relevant to any question. Perhaps we may distinguish between different kinds of executive determinations; and decide, in the first place, that the assent of a council should be ordinarily[1] necessary to the validity of any important general regulations that affect the interests of citizens other than the servants of Government, in view of the affinity between such regulations and laws. At the same time, it seems generally best that a department should have an individual head, who should be solely responsible for the most important appointments and for other particular decisions; but in cases of important and difficult work, it may be expedient — in order to obtain the greatest possible advantage from undivided responsibility without losing the safety that is proverbially held to reside in a multitude of counsellors,—to appoint along with an individual head of the department a council which the head is bound to consult on certain questions: so that the ultimate decision is left entirely to the individual head, but can only be taken after he has heard the opinions of responsible experts. The individual responsibility of the latter might at the same time be increased

[1] The requirement may be unnecessary where the regulation in question had already been adequately deliberated on by some other council or assembly, *e.g.* in matters decided by local governments subject to the approval of a central department. Also in war, or other crisis, the need of prompt and decisive action may render it expedient to entrust larger powers to individuals.

by allowing—or even requiring—each member of the council to record his opinion and the reasons for it in a document capable of being produced at any future time. This plan, however, should only be adopted in cases where the reasons that ought to influence decision are such as ought to be—and would be—written down under the conditions supposed: and it is liable not to work effectively if the councillors are dismissible at pleasure, or appointed merely for a limited period with possibility of reappointment: as they may then have too strong an inducement not to press their dissent from their chief.

§ 5. This leads us to the general question of the conditions of tenure of subordinate offices of the executive, which presents some difficulty. It seems especially important for the State to give to its employees as much security of tenure as can be reconciled with its need of loyal and efficient work; because they are deprived of the vague chances of rising to wealth by ability which compensate for instability of employment in many branches of private industry. If possible, therefore, the conditions of tenure, ordinarily attainable after adequate probation, should be such as to give practically complete protection against arbitrary, oppressive, or partisan dismissals; while allowing dismissal for crime or disgraceful conduct or serious breach of official duty, and also for such incompetence as would in an average man imply blameworthy neglect. A milder degree of incompetence in the lower ranks of the service might be left to the natural penalty of non-promotion; while in the higher grades a carefully-arranged system of pensions or "half-pay"[1] would render it possible to take or keep important tasks out of unfit hands, while securing from financial ruin the individuals passed over. If adequate security can be attained without legal limitations on the right to dismiss, there will probably be a gain in respect of efficiency; as there are kinds of serious incompetence and latent in-

[1] By "half-pay" is meant a portion of the normal salary of an official, —varying in amount according to his rank in the service—which is secured to him independently of employment.

subordination which are hard to prove judicially, though they are grave drawbacks to the efficiency of an organisation that has to do difficult and delicate business. Hence, where public opinion and the established traditions of the service effectually exclude partisan appointments and dismissal, a legal tenure "during pleasure" of the head of the department, practically understood to be a tenure "during good behaviour," has much to recommend it. On the other hand, in certain states of political feeling and habits, protection, beyond a mere understanding, may be necessary for adequate security of tenure.

Moreover, the danger ought not to be ignored, that an unscrupulous chief may use his power of dismissal to intimidate his subordinates into rendering services, to himself or to his party, that they ought to refuse. The subordinate's duty is, of course, only to obey such orders as the superior can legally give: at the same time, it would be unreasonable to require a subordinate to set his judgment against that of his official superior in any case in which the legality of the order appeared to the former merely doubtful: and even where its illegality would hardly be doubtful to an unbiassed mind, the subordinate's habit of official loyalty must be admitted as an extenuation for the offence of carrying out the order. It is therefore important not to add so strong a weight of self-interest on the side of blind obedience, as must be added if the subordinate's refusal to obey would involve a serious danger of professional ruin. Against this danger also public opinion may, at certain times and places, be a sufficient protection: but, on the whole, it seems generally safer to provide that subordinate executive officials who have attained a certain rank shall not be simply dismissible from the service by the head of the department alone, without the opportunity of appealing to some independent tribunal, which shall finally judge whether such dismissal has been deserved. There is less danger in leaving to the head of a department the power of compelling a subordinate to retire on half-pay or with an adequate pension: and in the case of officials employed in posts of much responsibility and importance, the want of a

power of summary removal may be the cause of grave evils.

§ 6. It remains to consider the appointment, control, and dismissal of heads of departments. We have already seen that the undivided responsibility of the head of a department as such cannot properly extend to questions, the decision of which, though they arise in his department, will materially affect the operations of other departments also. On these matters the ultimate decision must be pronounced either by some supreme governing individual,—whether distinct from or selected among the heads of departments,—or by some supreme council of which they either do or do not form part; and even questions that fall strictly within any one department will, if exceptionally important, be naturally reserved for this supreme executive. If, however, the supreme executive power is to be vested in a council, it will be more likely to possess the requisite knowledge and grasp of current affairs if it includes the principal heads of departments:—though it may be desirable to combine with these other persons of political experience, who being free from the burden of detailed executive work, may concentrate their attention on difficult questions of general policy. Such a council, again, will need a chairman, into whose hands a general supervision of executive business will naturally fall; and to whom it will be convenient to give enlarged powers of control, whenever frequent and prompt decisions are required to ensure the effective co-operation of different departments. On the other hand, if the supreme executive power is vested in an individual, a council of this kind will be needed to advise him.

The important final question, then, to which we are led in our process of constructing the executive organ from the bottom upwards, would seem to be this: should the supreme control be in the hands of a Cabinet, composed mainly of the principal heads of departments, with a chairman whose powers vary at the discretion of the Cabinet, or in the hands of an individual

to whom such a cabinet serves merely as a consultative council? The answer seems to depend on considerations broadly similar to those that we have already had to balance in dealing with the organisation of particular departments; except that in the case of the Cabinet the consideration of "undivided responsibility" becomes less important; since, in dealing with high matters of policy, even if responsibility is equally diffused among all the members of a cabinet, the burden resting upon each member appears sufficiently heavy. Still, I cannot doubt that there would be important advantages—especially at crises—in placing the whole business of administration under the direction of a single mind; provided there is a fair prospect that this mind will be really able to grasp and master it effectually. The probability of this is likely to vary with the size of the State, and the extent and complexity of governmental business: but perhaps we may assume, in the case of such a State as England, that the effective management of any one important department will demand the concentrated energy of a man of first-rate ability; and if so, it would seem that only a man of very rare talents and industry will be able to maintain so much acquaintance with the working of different departments as to be safely trusted with an overruling decision in all cases. And if such a man has the gifts that would, under any system of appointment by merit, bring him to the head of the government, he may be expected, where a Cabinet is formally supreme, to acquire predominant weight in it, and even a kind of informal dictatorship at any crisis that specially requires individual rule. On the other hand, if no such rare genius is forthcoming; and if, therefore, any available head of the whole executive is likely to have, at best, little more than the average ability of the head of a leading department, probably more harm than good would result from giving him the power of finally deciding all important executive questions: as he would be liable to intervene disturbingly, with inferior insight, in each department in turn, when its business became specially interesting, and when,

therefore, it was probably in special need of consistent as well as skilful treatment.

In any case, in order to maintain continuously the concentration of responsibility in each department, which we before saw to be desirable, the intervention of the supreme cabinet or individual in deciding any matter should not be held to relieve the head of the department of his responsibility for the decision, in the same way as the order of the head of the department relieves his subordinates of responsibility. In the latter case the subordinates remain responsible, of course, for the *legality* of what they do under orders, but they cease to be responsible for its *policy*: the head of the department, on the other hand, should be held always responsible for the policy of the whole exercise of executive discretion in his department: it should therefore be his duty to resign, if important decisions, of which he strongly disapproves, are passed by the Supreme Executive. Hence, it may be observed, if the heads of departments are chosen within the service, it is important to provide that they should have the right of returning to the posts previously held by them, or to others of equal dignity and salary: since, otherwise, the uncertainty of the tenure of a headship may prevent the fittest man from accepting it. But, as I shall explain in the next chapter, this question does not arise under the system of Parliamentary government, as ordinarily worked.

The question of resignation leads naturally to that of appointment and dismissal of heads of departments: which requires all the more careful consideration, because, as we shall see, the distribution of executive power within the Cabinet partly depends on the answer given to it. It seems clearly important that there should be an effective means of rapidly removing from their posts officials entrusted with extensive powers, if they should prove unfit. This may be provided for either by appointment for a short fixed period, or by a tenure terminable at pleasure by some supervising authority. The advantage of the former method is that it is practically easier—as being a less violent measure—not

to re-elect an unfit official than to remove him: on the other hand, an official irremovable for a fixed period may do much harm at a crisis, if, while palpably incompetent, he is so obstinately self-satisfied that public opinion cannot force him to resign. In either case we have to settle who is to pronounce on the fitness or unfitness of the head of a department,—whether for purposes of appointment only, or for both appointment and dismissal. It would seem that it must be either the supreme executive council or its head, or the legislature, or the citizens at large. Popular election, however, seems hardly more adapted to secure the special qualifications required for good administration in headships of departments than in subordinate posts:[1] the choice, therefore, may be taken to lie between appointment by the legislature and by the supreme executive. The advantage which the former arrangement would give of securing harmony between legislation and administration, and its attendant drawbacks, will be considered in the next chapter: but if we merely regard efficiency, it would seem that the majority of elected legislators will not be so well qualified, by experience of executive work, to select the most efficient heads of departments, or to dismiss with full and accurate knowledge of the proofs of unfitness, as the Supreme Executive. On the other hand, appointment by the Cabinet is not available when a complete change of cabinet is required: and to give the power and responsi-

[1] I am not prepared to affirm with J. S. Mill (*Representative Government*, chap. v.) that "numerous bodies never regard special qualifications at all. Unless a man is fit for the gallows, he is thought to be about as fit as other people for almost anything for which he can offer himself as a candidate." But we may perhaps agree with him in holding that "there is no act which more imperatively requires to be performed under a strong sense of individual responsibility than the nomination to employments," and "scarcely any act respecting which the conscience of the average man is less sensitive."

I am not here considering the case of a legislative assembly that actually undertakes the business of administration, and assumes in fact supreme executive powers. I shall argue in the next chapter that such an assembly is not likely to perform executive functions well: but the assumption of such functions, in a regular and continuous way, would doubtless render it less unfit to appoint such managers of executive departments as it would require.

bility of dismissing individual heads of departments to the Cabinet as a whole, would promote internal discussions and cabals tending to impair its harmonious working. There seems therefore to be a decided advantage in giving both the power of appointment and—assuming dismissibility—of dismissal to an individual head: and this must greatly tend to increase his preponderance in the cabinet, even if he has not formally more than a chairman's position.

But where the existence of the cabinet as a whole depends on the support of the representative assembly, the degree of preponderance thus given will vary much with the personal qualities of the selecting head, and his influence in the legislature and in the country. Thus, in England, the most important executive questions are practically[1] decided by a governing cabinet whose head, the Prime Minister, under ordinary circumstances, practically appoints—and could dismiss if necessary—the other members of the cabinet, and other heads of departments: and whose business it is to summon the cabinet and guide its deliberations. These functions naturally tend to give a special weight to his opinion in cabinet discussions: and this weight is increased by the fact that his resignation would certainly cause a dissolution of the cabinet, whereas the resignation of any other member would not necessarily have this effect.[2] At the same time, as all members of the cabinet are equally responsible for its decisions; as the resignation of an important section of the cabinet, if supported by an important section of the House of Commons, would be practically a deathblow to the cabinet as a whole; and as in all cabinet appointments the Prime Minister is practically compelled to recognise the claims of influential members of his party in the legislature;—it seems an exaggeration to say that "power and responsibility

[1] I say "practically," because its decisions are not formally binding: the law of the constitution knows nothing of the cabinet.

[2] Of course the dissolution of the cabinet might be immediately followed by a reconstruction of the same elements; but reconstructions are uncertain.

are concentrated in the hands of"[1] the Prime Minister. At any rate, so far as this is actually the case, this monarchical result must be attributed not so much to his position as practical head of the executive, but rather to his predominant influence in the legislature and the country: and the extent to which the statement is true is likely to vary considerably, as the relative popularity of prime ministers and their colleagues varies.

§ 7. In what I have just said of the English type of government I have made no reference to the hereditary monarch, whose formal supremacy over the heads of executive departments is indicated by the familiar term "minister," by which the latter are best known. This omission, however, is merely for the sake of simplicity: since, as will be presently seen, I regard the functions of the hereditary monarch, in a country possessing representative institutions fully developed, as very important. Still it remains undeniable that in our Constitution, as now established by the tradition of at least more than half a century, the general direction of the policy of the English executive is in the hands not of the hereditary monarch, but of a cabinet presided over by a prime minister, who, so long as he retains the confidence of the majority of the representative assembly, is not practically removable by the monarch. And the same may be said of some at least of the Continental States which (for the most part recently) have adopted constitutions framed on the English model.

There is, indeed, a fundamentally different view of constitutional monarchy, which was in the last century the theoretically accepted English doctrine, and which is still maintained by leading publicists[2] in Germany, and apparently realised in the present German Empire. According to this view, the true constitutional monarch must *govern* as well as *reign*: and though, being irresponsible, it

[1] This is the view of Todd, *Parliamentary Government*, vol. ii. chap. iii. p. 173; adopted also by a well-informed contemporary writer, Mr. H. D. Traill, *Central Government*, in the "English Citizen" series.

[2] See, *e.g.*, Bluntschli, *Theory of the State*, Book VI. ch. xv. xvi.

is necessary — as a protection against tyranny — that he should be constitutionally incompetent to perform any executive act without the co-operation of a responsible minister, still it is his duty in all such acts to exercise an independent judgment on the advice offered by his ministers, and to keep the reins of administration firmly in his own hands.

The advantages and drawbacks of this system cannot well be discussed without entering fully into the consideration of the relation between the legislature and the executive, which I have reserved for the following chapter. My aim now is rather to point out the essential difference between the German type of government, which may be called Simple Constitutional Monarchy, and the English type; which we shall find it convenient to distinguish sometimes as "English Parliamentary Government," sometimes as "English Constitutional Monarchy"—according to the point of view from which it is regarded. The personal irresponsibility of the monarch, in the English view, is essentially connected with comparative powerlessness in current administration[1]—it is held that the ministers who have the sole responsibility for executive acts must also have the decisive will in doing them; whereas, in the German view, legal irresponsibility is an essential attribute of supreme power, which is held to be vested in the monarch. It may be further observed that the "Constitutional responsibility" of ministers is differently conceived in the two views: in the German view it means—primarily, if not solely—their liability to punishment for illegal or corrupt use of their power: in the English view the most important part of the meaning is, that ministers are liable to dismissal if their policy is disapproved by a majority of the representative assembly and of the electorate. This difference is, of course, due to the essentially different relations between the executive and the legislature in the two systems: which we will now proceed to examine further.

[1] I shall explain in the next chapter why and how important powers still remain to the monarch in the English form of government.

## CHAPTER XXII

### THE RELATION OF THE LEGISLATURE TO THE EXECUTIVE.

§ 1. THE relation of the Supreme Executive to the Legislative organ is one of the knottiest points in constitutional construction; it is variously conceived by different theoretical politicians who agree in accepting the principle of popular control over legislation, and variously determined in different modern states in which a popularly elected assembly is actually a main element of the legislature. In the present treatise I think it best not to attempt a single solution of the problem; but rather to characterise the chief methods of dealing with it that seem at all acceptable, point out their advantages and drawbacks, and make some suggestions as to the particular modification of each method which is most likely to be stable and efficacious.

In a previous chapter it was shown that the legislature, from the nature of its functions, must be, in a certain manner and degree, supreme over the other organs of government: since its main business is to lay down the general rules which the executive and the judiciary, no less than other members of the community, are constitutionally bound to obey. Hence the most obvious and simple mode of determining the relations between the legislature and executive would seem to be that of complete subordination —*i.e.* that the supreme executive should be appointed by the legislature, bound to carry out any resolution it may pass, and simply dismissible at its will. In this way the perfect harmony between the two organs, which is obviously

conducive if not indispensable to efficient government, might be easily and thoroughly secured. To attain this result, however, it seems necessary that the legislature should consist of a single body, capable of corporately deciding any question brought before it by a simple majority of votes, and not of two or more bodies, each of which can check the rest: since otherwise the desired harmony would be liable to be marred by a conflict among the bodies of which the legislature is composed, sustaining a conflict between one or more of these bodies and the executive.

This arrangement—on the assumption that the single legislative body is a numerous assembly, chosen from time to time by the citizens at large,[1]—may be distinguished as Simple Parliamentary Government. Its simplicity is an obvious and real merit: but the institution has not been adopted by any modern state, and appears to be open to very serious objections. The first of these is the consideration to which J. S. Mill gives most weight in favour of two legislative chambers,—"the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should be able, even temporarily, to make their *sic volo* prevail, without asking any one else for his consent. A majority in a single assembly, when it has assumed a permanent character, easily becomes despotic and overweening"[2] if released from all external check on its power. Further, an assembly that can dismiss the executive at will must be expected to grasp, either occasionally or permanently, the supreme direction of the business of the executive: if, as is not unlikely, its control were only exercised in a fitful and irregular way, when any affair reached a specially interesting crisis, its intervention would be almost certainly

[1] In chap. xxvii. I shall consider whether the elected legislators should be, in their turn, dismissible at will by their constituents. This is perhaps the most natural arrangement according to one rather prevalent view of representative government: but I do not think it would be a good arrangement: and it seems more convenient to defer the discussion of it.

[2] *Representative Government*, chap. xiii.

ignorant and impulsive: while if its control were of a more settled and regular kind, it would practically become the supreme executive, and the government would be liable to the disadvantages—before noticed[1]—that attend on the union of legislative and executive functions in the same hands. And even apart from the general objections to this cumulation of functions, it seems improbable that a numerous assembly, whose members are elected for short periods, would make a good supreme council for the administration of current affairs: especially where considerations of importance in deciding an administrative question could not be made public without detriment to the community. This latter is most likely to be the case in foreign affairs: and here it is further to be observed that—apart from any need of secrecy—there is reason for doubting whether a representative assembly will be well qualified for managing wisely the *external* relations of the community. To the consideration of *internal* affairs a truly representative assembly is likely to bring—at the lowest estimate of the elector's faculty of choice—an important and indispensable element of the knowledge that a statesman ought to possess. For in such a body the political needs and aspirations of all the different sections find adequate expression; and what even comparatively unenlightened and half-instructed persons feel and want in such matters is worth knowing; they can at any rate tell us exactly where the shoe pinches, and their experience may help us somewhat in finding a remedy. But in foreign affairs what the ordinary members of any community desire is, for the most part, the attainment of very vague and general ends—peace as far as possible, the respect of other nations, justice according to their own view of it in any collision of interests, and victory when they go to war: and the best means of realising these different and somewhat incompatible ends can only be ascertained by a kind of study and experience which lies quite apart from that which the majority of the representative assembly can be relied on to possess. Again, in foreign affairs—especially

[1] Chap. xix. § 7.

when a nation is in keen competition and danger of conflict with vigilant and energetic rivals—we require combinations and preparations for remote contingencies, a power of concluding agreements with great promptitude, and a stability and consistency of policy which neither reason nor experience would lead us to expect in a numerous rapidly changing assembly. And finally, as I before noted, what was said of the *primâ facie* natural supremacy of legislative over executive functions in internal affairs applies much less in this other department: since the external relations of a community are hardly capable of being regulated by definite, stringent, and permanent general rules. If, then, to avoid the dangers of disunited and conflicting directions at a crisis, it is important that the ultimate control of internal and external executive functions should be in the same hands, we are led to the conclusion that it is undesirable to make the executive the simple agent of the legislature.

§ 2. If, however, in view of these considerations, we suppose a large share of power—such as the English Cabinet possesses—to be allowed to the supreme Executive, still simply dismissible at the will of the legislature, new drawbacks and dangers present themselves;—the drawbacks and dangers of a Parliamentary Executive. I use this term to denote the arrangement by which the headships of the most important departments of the Executive are allotted to leading members of the majority in the Legislature. It is important to observe that this arrangement is not a necessary consequence of the undisputed supremacy of Parliament—rather we may say that a parliament really governing, in the fullest sense of the term, would hardly find room for what I call a Parliamentary Executive. If we suppose Parliament to keep the control of current administration effectively in its own hands—dividing the determination of all important questions between the assembly in full session and committees appointed for the different departments of work—it would only require further such executive heads as the highest

*permanent* officials in the English administration now are; persons of ability and experience, and often large influence, but accustomed in all important matters to carry out unquestioningly the decisions of their parliamentary chiefs. Such permanent heads would be obviously fitted to supply the element of continuous special experience in which Parliament and its committees would be likely to be wanting; and, as this kind of subordinate work would not offer an irresistible prize to the parliamentary leaders, it would be natural to keep the management of the executive departments, under Parliament, in the hands of such permanent officials, chosen for their qualifications for their special work, and at the same time willing to serve loyally the dominant majority for the time being in Parliament and its committees. Such extra-parliamentary heads would not, indeed, necessarily be taken from the subordinate officials in their respective departments—if a sweeping reform were required in any branch of the administration it would be probably best to introduce an outsider,—and it would doubtless be difficult to prevent parliament from being an avenue to the posts. But at any rate it might be hoped that any member of parliament appointed would have some claims to special fitness for his post, and when appointed he would give up his parliamentary position. Appointments in the Executive would, in short, resemble appointments in the Judiciary under the present English system; by which parliamentary lawyers are often made judges, but a man ignorant of law could not practically be made a judge, although a man ignorant of finance may be made Chancellor of the Exchequer. This might, perhaps, turn out to be the least unsatisfactory plan for working simple Parliamentary Government, in spite of the disadvantages inseparable from administration by a numerous elected assembly.

But if, to avoid these disadvantages, large powers be left to the supreme executive, the exercise of these powers can hardly fail to be an object of the highest political ambition, while at the same time the parliamentary majority will naturally demand that they should be entrusted to persons

who have its confidence. The chief executive posts will therefore be filled by parliamentary leaders, who, though they will be probably persons of general intellectual force, are more likely to be distinguished for oratorical gifts and parliamentary tact than for administrative talent. This is one disadvantage of a parliamentary executive; another is that the prize thus offered to parliamentary ambitions is likely to stimulate intrigues and combinations for personal ends. The executive will thus be in constant danger of being suddenly thrown out of office by such intrigues; and it will be exposed to a similar danger from honest changes of political opinion, whenever the majority supporting it in the legislature is either small or naturally unstable from the multiplicity of party divisions.[1] In view of these dangers, the ministers will be drawn to devote a large share of their attention to the business of managing the legislature, in order to detect and frustrate the plots of personal ambition, and more effectually meet or avoid the attacks of hostile combinations of all kinds: and their energies are thus likely to be distracted from their proper work.

§ 3. In the modification of Parliamentary Government which has gradually been developed in England, under the forms of constitutional monarchy, the objections to a Parliamentary executive are somewhat reduced by the power which the executive possesses of dissolving parliament. In all cases where this system is actually working, the legislature consists of two chambers; but it will be convenient for the present to ignore the Senate or Upper Chamber; and in so doing we shall not diverge very materially from actual facts, as this chamber has usually little share in the control exercised by parliament over the executive. In the English species of Parliamentary Government the practical head of the executive is practically though not formally selected by the majority of the representative assembly,—at least when the choice of this majority is clear and decided; while the

[1] I shall hereafter point out (chap. xxix.) as a merit of the two-party system that it tends to reduce this danger, though it does not completely get rid of it.

other members of the supreme Executive Council or Cabinet are also leading members of the same majority (or persons of similar views in the second chamber). But, when formed, the Cabinet is not removable at the will of the representative assembly that practically appointed its head: the executive has by established constitutional custom the power of dissolving the body by which it was indirectly appointed—or any subsequently elected assembly—and causing a new election. It is the recognised duty of the cabinet to resign office, unless it can obtain the support of the majority of a representative assembly: and should it refuse to resign after a vote of want of confidence, it would be regarded as the constitutional right of the assembly—and the proper course under the circumstances—to compel its resignation by refusing to furnish supplies:[1] but the executive may always by a dissolution appeal to the electorate from any particular assembly with which it may disagree on any vital question of policy. In this way two results are attained: there is normally a close harmony between the Cabinet and the assembly, any breach in which tends to be rapidly healed by a change in the *personnel* of one or the other organ: while at the same time the two bodies mutually check each other in a manner which tends to remove from either the temptations that arise from the consciousness of supreme power. If the representative assembly could simply dismiss the Cabinet at any moment, the latter might be compelled to watch its drifts of opinion and gusts of sentiment with the same absolute subserviency with which an Eastern vizier watches the whims and humours of an individual. But when the executive has the power of dissolving the assembly the case is altered: first, because the majority in the representative assembly can never be *certain* that it rather than the executive will be supported by the nation: and secondly, because an election is usually a troublesome

[1] In England the resignation of ministers might also be compelled by refusing to pass the annual Mutiny Act authorising the discipline required for the army. But in the Continental adaptations of English constitutional methods, Refusal of Supplies is generally recognised as the normal method of enforcing parliamentary control over the executive.

crisis in the parliamentary career of a representative, which he has, therefore, a personal inducement to postpone. Thus while parliamentary control effectually checks any misuse of power by the executive, which the parliamentary majority would disapprove, on the other hand the power of dissolution enables the executive to resist any caprices and vagaries on the part of the legislature, which the majority of the electorate, if appealed to, would disapprove; and at the same time the possibility of any prolonged conflict between the two is completely excluded.

The essential features of this system are independent of the existence of the hereditary monarch who, in most countries under Parliamentary Government, formally appoints the practical head of the executive. If the Prime Minister in England, or any country that has adopted the English type of "constitutional monarchy," were appointed directly by the House of Commons, the whole business of government might go on without any material change—at least in ordinary times,—and the balance of power between executive and legislative organs might be the same as at present. The question therefore arises how far such an official as the hereditary monarch has come to be is needed in a constitution of the English type,—in which the claim of the leaders of the majority of Parliament to form the supreme administrative cabinet is practically undisputed,—except to maintain the continuity of constitutional development in a country that has been more monarchically governed. At present the hereditary monarch in such a constitution is the highest representative of the executive on all ceremonial occasions, and has to give formal assent to the most important executive acts. He has a right to have full information as to the grounds of all such acts, and to require them to be discussed with him before his assent is given. But he has not, according to the existing constitutional understanding, a right to impose his own policy on his ministers: if there is an irreconcilable disagreement in policy between him and them, the monarch is bound to give way—at least if their designs are not illegal, and if they are supported by a majority of the

representative assembly and of the electorate. Let us ask, then, how far it would be desirable to establish such a hereditary monarch—or an elected official having corresponding functions—in an English colony that was carrying out a peaceful separation from the mother country, and equipping itself for perfect political independence: or in any other civilised community in which a fair degree of education and enlightenment was generally diffused, supposing it to be somehow in need of a new constitution.

§ 4. In examining the effects of such an institution it will be well to distinguish between the normal functions of the monarch—as it will be convenient to call him—in ordinary times, and his exceptional functions in relation to actual or possible changes of government. Among the former, if we are considering the actual social conditions under which the English type of constitutional monarchy exists in West European states, we must certainly count as important, from its effect on popular imagination, the additional appearance of stability which the government gains by the permanence of its formal head amid the changes of ministries. As we shall presently note, the liability of these changes to occur with disturbing frequency is one of the defects of this form of government: and if it be said that the bad effect of such changes on the work of government is rather veiled than diminished by the unshaken permanence of the hereditary monarch, we may fairly answer that to veil it is to mitigate it, owing to the practical importance of the prestige of government, in producing a general sense of confidence among the governed, and maintaining the habit of willing obedience. It seems probable, however, that as the political consciousness of a nation grows, and the sentiment of loyalty to the state comes generally to take the place of that personal feeling towards the (so-called) "sovereign" which West European communities have inherited from an earlier stage of development, this utility of the hereditary monarch will become at any rate less important.

But further, apart from any consideration of prestige, the mere permanence of the position of the monarch,

with the central and intimate acquaintance that he tends to have with all governmental affairs, affords an opportunity for an able man to acquire such political knowledge and experience as ought to qualify him for rendering valuable aid in the actual work of government. Such aid, in ordinary times, would be given mainly in the way of advice, which, in the last resort, the responsible minister would have by constitutional usage a right to reject. But wise counsel based on long experience, from one superior in formal rank, is likely to have much effect on all occasions on which the responsible ministers admit the matter in question to be doubtful and difficult: and in fact—though an exact estimate is naturally unattainable—it is commonly believed that the counsels of monarchs of ability exercise a substantial influence on government, even in states in which the present English view of constitutional monarchy is fully accepted.

The function just described is one, in the exercise of which a monarch, if able and energetic, may do much good; while, if stupid or weak and frivolous, he can do little harm, except in the way of wasting time. The same cannot, however, be said of the power which the constitution actually leaves to the monarch — and which can hardly be withdrawn without reducing monarchy to an empty ceremonial—of successfully opposing his will to that of his minister, on any points which for any reason the minister is unwilling to carry by threatening resignation. The exercise of this power may indeed be highly salutary; but it may also be inconvenient and mischievous. It will tend to be generally salutary, so far as it prevents measures that involve a violation or straining of law, such as the majority of the legislature would shrink from supporting, if challenged by the monarch: or, again, corrupt measures, which might in the ordinary course of things escape censure, but would certainly meet with general disapproval, if exposed with all their circumstances to the full glare of publicity. On the other hand, the monarch's power is likely on the whole to be mischievous,

so far as the responsible minister has exercised his judgment honestly within legal limits, and merely gives way on minor points from a desire to gratify the monarch; or because it is his interest to avoid friction, lest a decided aversion on the monarch's part may at some future conjuncture prove an impediment to his ambition. On the whole, we may say that if the monarch's power of opposing up to the point at which the minister would threaten resignation is kept in ordinary use, it is likely to do more harm than good, though the harm will be of a minor kind: if it is regarded as a reserve power to check abuses, it can hardly fail to do more good than harm, and the benefit may occasionally be considerable.

So far I have supposed that the disagreement between the monarch and his minister does not lead to the resignation of the cabinet. But even if the conflict is pressed to this result, and if the cabinet is supported by the majority of the representative assembly, the monarch's power of resistance is not necessarily at an end; since he may appeal from Parliament to the electorate, by dissolving the representative assembly, provided he can find ministers willing to take the responsibility of this measure. It is quite consistent with the general scheme of English constitutional monarchy that the monarch should have this power: and I believe that—according not only to law but to the generally accepted constitutional understanding—the English monarch is still held to have it: though it has not been exercised since 1834. It is held that he would be strictly within his constitutional rights in dismissing his ministers, even though they had the confidence of a majority in the representative assembly, and appointing others; who would then dissolve the assembly, in hopes of changing the balance of parties in Parliament by a new election. Of course, if this hope were disappointed the new Cabinet would have to resign at once: in which case the monarch would incur the reproach of having caused a troublesome and costly interruption of political business with no useful result. Hence this power is not likely to be used except

when the monarch expects that the Cabinet and representative assembly together will be found in disagreement with the majority of the electorate as well as with himself. And I think it probable that the exercise of such a power would be on the whole beneficial; although, according to the line of reasoning adopted in the present treatise, it is not an undoubted gain, nor the main object of the representative system, to secure that the executive and legislative organs of government shall follow as closely as possible all change in popular opinion and sentiment.[1]

It is a different question whether the monarch should have the right of *refusing* a dissolution when his cabinet wishes for one, in consequence of its disagreement with the majority of the representative assembly. I think it is universally admitted that the monarch in England, and in other countries which have adopted the English type of government, actually possesses this power of refusal: I mean that he could practically exercise it, without any breach of constitutional custom, if the leaders of the majority in the representative assembly were willing to form a ministry. And such a power is clearly reconcilable with the general principles of the constitution, since its exercise is quite compatible with the maintenance of complete ministerial responsibility, and cannot lead to any conflict between the executive and the legislature: moreover it can only be used to *prevent*—not to *cause*—a troublesome disturbance of the course of political life. At the same time, its advantage on the whole seems to me doubtful: since the consequent uncertainty as to the cabinet's power of dissolution must tend somewhat to alter the balance between the cabinet and the legislature in favour of the latter; and it seems to me that any parliamentary executive is rather in danger of being too weak than too strong. Also the possession of this power may tempt the monarch to give effect to a preference for one

[1] See ch. xxvii. It is further to be said that this power of dissolution might be valuable in a crisis as a means of defeating the designs of an ambitious minister, meditating a *coup d'état*. But it might equally be used to promote revolution, either by an ambitious monarch aiming at an increase of his power, or by a weak monarch worked as a puppet by others.

party in the state: he can, for instance, grant a dissolution when a Conservative cabinet are at issue with the House of Commons, and refuse it to a Liberal cabinet in the same situation: and such preferences are sure to cause friction and discontent.

Finally: there are certain cases in which the monarch, however fully he has accepted the principle of parliamentary government, will have some substantial as well as formal power of selecting his ministers. For instance, if the parliamentary majority has no clearly marked leader, either from political divisions within it or from equality of personal claims, it is always possible that the monarch's selection of a Prime Minister may be generally acquiesced in as a tolerably satisfactory solution of a difficult problem, although a different man would have gained the majority of votes in the assembly. Again, though, under ordinary circumstances, constitutional morality would prevent the monarch from endeavouring to control the Prime Minister's choice of his colleagues, this rule admits of exceptions: *e.g.* party ties might lead a Prime Minister to recommend for office a politician whose reputation was so bad, that it would be in the monarch's power to refuse assent without incurring popular disapproval. The existence of this occasional power would seem to be a clear advantage, though not a very important one.

I have analysed carefully the functions, other than merely formal or merely consultative, of the English constitutional monarch, because I think it important to show exactly how much substantial power may be allotted to him consistently with a complete acceptance of the principle of Parliamentary Government. My conclusion would be that the exercise of these powers is likely to have, on the whole, a good effect on the working of a parliamentary executive; though I admit that the benefits are balanced by not inconsiderable drawbacks. But in any case, I do not conceive that if these powers were withdrawn, the other utilities of monarchy could be permanently retained. For if the monarch's public actions were ever absolutely

reduced to a performance of merely formal and ceremonial duties, his private counsels would soon come to be listened to with a merely formal respect, and — as his real impotence would become known — the institution would lose the prestige that renders it a source of stability. If constitutional monarchy is to be retained as a permanent form of parliamentary government, I am convinced that the monarch must have at least as much real power as I have above attributed to him.

§ 5. It remains to be considered whether the official who exercises these powers should attain his office by in-inheritance. Actually — with the single[1] exception of France — the relation between the executive and the legislature that I have been describing has never been established in an independent state without a hereditary monarch as formal head of the executive. And there certainly seem to be strong reasons — apart from historical continuity — for retaining this institution; since hereditary succession affords the best prospect of securing in the monarch due impartiality in relation to current political factions; and the impression of stability, which is a valuable result of this permanent formal headship, is likely to be aided by the influence over popular sentiment which hereditary dignity now gives. On the other hand, the ceremonial and sentimental part of the monarch's utility seems likely to be only temporarily needed in an age of transition: while, in view of the services that he might render as a *dépôt* of experience and source of counsel for transient ministries — and occasionally in resisting illegal or corrupt proposals, and in determining dissolutions and selecting first ministers — intellectual qualifications seem to be required such as heredity can hardly be expected to secure. On the whole, I think that if the English form of parliamentary government should ever be adopted in a modern state, otherwise than by the concession of a hereditary monarch, who retains his

[1] Moreover, the Parliamentary Government of the present French Republic does not exactly realise the type above described, because in France the right of dissolution can only be exercised with the consent of the Senate.

position while sacrificing a portion of his power, it is hardly likely that the formal headship of the executive would be made hereditary.

Supposing that the functions of the English constitutional monarch are to be given to an elected President, the period for which he is elected should be long enough to give the advantages of stability; but not so long as to render it difficult to avoid the drawbacks of senility, while electing a statesman of ripe experience.

§ 6. One important consequence of the harmony that the English system—and indeed any system which includes a parliamentary executive—establishes between the executive and legislative organs, has yet to be noticed: viz. that the Cabinet naturally has the initiative in all important legislation. Composed as it is, entirely or mainly, of leading members of the legislature, who as heads of departments have at their command the most recent executive experience of the working of existing laws, it is for some purposes the best committee that could be appointed to frame new laws;[1] and the advantage of a single strong committee for preparing legislative business has already been dwelt on. In fact, this preparation of laws is so prominent and striking a part of the function of the Cabinet in the English system as actually worked, that probably many persons, if they were asked to give a general account of the work of ministers, would put first and foremost the duty of framing and carrying legislative measures.

The result at which we have thus arrived is historically somewhat curious. On the one hand, in the English constitution of the eighteenth century, the cardinal point noted for eulogy by its admirer Montesquieu was the security for freedom given by *separation* of powers—legislative, executive, and judicial. On the other hand, one of the most conspicuous features of the actual working of the same constitution, in the nineteenth-century phase of its development,

[1] I do not, however, think it desirable that so much legislative work should be thrown on the Supreme Executive as is actually undertaken by the English Cabinet. See § 10.

is the *union* of legislative and executive functions in the same hands. The ministers whose functions according to constitutional law are entirely executive have come to be practically also a committee appointed by the majority in the representative assembly for the purpose of framing legislative measures: while the House of Commons is constantly concentrating its attention on its customary duty of modifying by criticisms and suggestions the most important and interesting of the strictly executive acts of the Cabinet, as well as its legislative proposals.

§ 7. The harmony thus secured between these two chief organs of government is in itself an undeniable gain. But it must be admitted to be purchased by serious drawbacks, to a large extent similar to those of Simple Parliamentary Government. In the first place, the advantages of division of governmental labour tend to be lost in the fusion or confusion of legislative and executive functions above described; ministers are liable to be distracted from their executive duties by the work of preparing legislative measures and carrying them through Parliament; while Parliament is tempted away from legislative problems by interesting questions of current administration, in which, especially in foreign affairs, it is liable to interfere to an excessive extent. This evil is no doubt diminished by the counter-check exercised on the assembly when the Cabinet has the power of dissolution, but it is by no means removed: to maintain harmony between the two organs, the executive is continually led to adopt not what it considers on the whole the best course, but the course which it regards as most easily defensible in the face of parliamentary criticism, or least likely to provoke it. On the other hand, the burden of legislative work now laid on the Cabinet might be much reduced by a proper devolution of the details of legislation on standing committees of the legislature, duly aided by a Legislative Council or permanent staff of legal experts; though it would perhaps be difficult to lighten it sufficiently so long as the present system of party government[1] is maintained.

[1] See chap. xxix.

Again, English "Cabinet Government"—as Bagehot calls it—shares in a considerable measure the instability which we have recognised as a defect of Simple Parliamentary Government. The executive is liable to be upset at any moment by a breeze of popular disfavour, unless the representative chamber is not in harmony with the popular movement: it is also liable to be upset by intrigues and new combinations of parties in the chamber, if the intriguers are skilful in choosing their opportunity, so that their newly-formed majority is not upset on an appeal to the country. Thus, apart from the continual interference of Parliament with executive business, the mere uncertainty of tenure of the supreme executive tends to render very difficult the adoption of a far-sighted and consistent policy.

We ought perhaps to notice here a more remote risk of instability attaching to the English form of Parliamentary Government, which is not found in the simple form: viz. that the nominal head of the executive—whether hereditary or elected—may be tempted to grasp at a real share of power, corresponding to that which he formally possesses, and with this object to intrigue against his ministers and endeavour to gain partisans and popularity of his own. Parliamentary government, in the form of constitutional monarchy, rests only on custom and opinion: it could be gradually metamorphosed, without any legal change, into simple constitutional monarchy, in which the monarch selects his own ministers and has a decisive influence in determining their policy: and the process of change—whatever may be thought of its results—could not but be disturbing and weakening to the efficiency of government.

I have reserved to the last what some regard as the most important defect of the English system: its tendency to entrust the headship of the different departments of the executive to persons who are not—from a strictly executive point of view—experts. The Premier's choice of the heads of departments is seriously limited by the connection of the Cabinet with the legislature. He is practically forced to select them among the leading speakers of his party in the

representative assembly, in order that the defence of his measures before the assembly may be as strong as possible. Hence though they are likely to be persons of oratorical talent and parliamentary tact, there is no adequate presumption that they will possess administrative ability: still less that they will possess the special knowledge required for particular departments. Nor will the prime minister even be able to distribute them among the posts in the manner which would be best from an administrative point of view: since he will have to take into account the relative dignity of different posts and to make this correspond to the parliamentary positions of the persons appointed.[1] Hence—especially when there are rapid changes of ministry—the heads of departments are liable to be persons who are not really qualified for managing, and if well advised do not attempt to manage, the business of their departments. And thus it may be said that English constitutional monarchy results not only in one sham, but a complex system of shams: we have not only a ruler who merely pretends to rule, but also ministers who merely pretend to administer.

There are, however, weighty considerations on the other side, which have been forcibly urged by Bagehot in his book on the English Constitution. He maintains, in the first place, that special experience is not so important as the critics of parliamentary ministers imply; most businesses being more like each other in their upper posts than in their lower. Secondly, he urges that the special function of the parliamentary head of a department, which a permanent head could not so well perform, is to save the office from the deadly disease of routine, to act as a channel by which the useful part of outside complaints and criticisms may be forced on the attention of the officials who are too apt to despise them as uninstructed clamour: while, thirdly, he points out that so far as the outside clamour *is* misdirected, the parliamentary head from his influence over the legislature is able to prevent unwise legislative interference with the

[1] Even the conciliation of the parts of the country whence they come cannot be altogether neglected.

department, on occasions on which a permanent head—even if allowed a seat in the legislature or a right of addressing it —would be practically powerless. Thus the parliamentary minister, even granting that he does not really administer his department, is not to be regarded as a mere puppet: he is at once a channel for useful influence, and a buffer against mischievous influence.

These arguments of Bagehot are forcible and important: but it remains difficult to believe that any business can be under the best attainable management when the chief who has the whole responsibility of action lacks the knowledge and experience requisite for wise independent decisions. I think, therefore that we have here a defect of the actual system of Parliamentary government, against which a remedy is needed, if governmental administration is to reach a high pitch of excellence.

§ 8. A consideration of these defects has led some thinkers to the conclusion that they outweigh the advantages of any form of Parliamentary government, especially in a country whose foreign relations are of much importance and difficulty, requiring careful management. In a country like Germany, in which representative institutions are of recent introduction and hereditary monarchy retains much of its old prestige, this conclusion leads influential publicists to support the independence of the hereditary monarch in his choice of ministers, and in the direction of current administration within the limits of law. According to this view,[1] the hereditary monarch, though it ought to be his aim to work in harmony with a representative assembly, ought not to be absolutely compelled to choose his ministers from the leaders of the parliamentary majority at any given time: the proper functions of Parliament are legislation and criticism, not nomination; and though legislation should include the determination of the taxes to be paid by the citizens, it can never

[1] See for instance Bluntschli's *Lehre des Modernen Staats*, Part I. Book VI. ch. xv. and xvi., and Part II. Book II. ch. x. Other German publicists adopt a still more monarchical conception of Constitutional Monarchy, which I shall have occasion to notice in chap. xxvii.

be the constitutional duty of the legislative assembly to make their criticism take effect in a *general* refusal of supplies; —which is commonly considered in England to be the obvious constitutional resource for compelling a refractory monarch to take the ministers that Parliament approves. It is admitted that if the king's ministers do not possess the confidence of Parliament, the latter will legitimately manifest its distrust by refusing to support any dubious costly enterprises, foreign or domestic, in which the monarch and his ministers may wish to indulge, or only supporting them in a niggardly manner; and it appears to be admitted that the obstacles thus continually placed in the way of the monarch's designs are likely to lead, in the long run, to the retirement of a minister who cannot persuade Parliament to open its purse-strings; but it is held that though in this way strong inducements are applied to the monarch to avoid a conflict with the assembly, these inducements ought never to amount to a moral coercion to take the leaders of the parliamentary majority as his ministers, or to let them dictate his policy. This system, in short, aims at making the real power of the monarch correspond to that formally given to him in the English Constitution, and others framed on its model: and I have accordingly termed it Simple Constitutional Monarchy.

If we suppose a constitution of this kind established, and accepted without *arrière pensée*, in a modern state, it seems quite conceivable that public opinion alone might prevent the legislature from so exercising its control over supplies, as to transfer the practical headship of the executive from the monarch to a parliamentary leader; since such an exercise of power would be a plain perversion of the express design of the constitution. And though the example of England would encourage attempts in this direction, it would also serve as a warning to the adherents of monarchy. At the same time this form of government would gain in stability if the independence of the monarch were protected from the encroachments of the representative assembly by other than merely moral

restraints. Such protection might be given[1] by drawing a distinction between "ordinary" and "extraordinary" expenditure and taxation, and fixing the ordinary budget permanently, like other matters legislatively determined, subject of course to modifications agreed upon by the assembly and the monarch. If the fixed taxation should exceed the fixed expenditure, a similar agreement would be required to dispose of the excess: in the opposite case of a deficit, the executive must have the power of imposing fresh taxes to the extent required to meet the deficit, until such taxes were imposed by the assembly. In this way the assembly's control over finance would become a much less effective instrument for reducing the monarch to submission; but its power of defending the citizens from overtaxation would still be adequate to prevent unnecessary taxes from being imposed, or fresh expenditure incurred without its consent. Similarly, without impairing the security afforded by the representative system against new oppressive legislation, the monarch may be enabled by an effective right of "veto" to resist legislation designed to fetter and subjugate the executive; indeed such a right of veto seems almost necessary to the stability of this form of government. The protection of the veto, however, may prove insufficient in the long run; as, if in a weak moment the executive gives way, it may not be able to recover the lost ground. Hence, as a further barrier against such legislative encroachments, it may perhaps be well that the assembly should be constitutionally[2] restrained from interfering—otherwise than by criticism and the refusal of assent to new expenditure—in certain departments of executive business; such as the selection of legally qualified persons for executive and judicial employment, command of the army, and the management of foreign relations generally, except in the case of

[1] I shall notice in the next chapter that such protection may to some extent be given by the institution of a Senate or Upper Chamber. At present, as I have before said, I assume that the representative assembly constitutes the ordinary legislative organ.

[2] The general expediency of such constitutional restraints on the ordinary legislature will be discussed in a subsequent chapter (xxvii.).

certain important decisions, in which the intervention of the legislature cannot well be excluded.[1]

Measures of this kind might assist in securing a substantial independence to the executive under the headship of the hereditary monarch, without rendering illusory the popular control over legislation and taxation that is provided by the representative system, and therefore without incurring the danger of unchecked bureaucracy. At the same time there are serious objections against giving so much power for life to an individual, whose moral and intellectual qualifications for its exercise are so uncertain as a hereditary monarch's must be. Moreover, such an arrangement involves the danger of an obstinate and irreconcilable conflict between the monarch and the majority of the citizens. In a people whose political consciousness is fully developed, such a conflict when prolonged tends to become a serious political disorder: for all political order, as we have seen, rests upon habitual obedience to government, which a certain amount of dislike and disapproval tends to undermine. And it may be observed that in a society that takes a close and critical interest in public affairs there is a tendency for discontent with the executive government to grow and accumulate: since this organ exercises normally a variety of invidious functions which almost inevitably tend to bring it into collision with individuals and classes; and every government makes mistakes. Such gathering clouds, in our present English system, are dispersed by changes of ministry. But if the executive has a permanent head who is morally responsible for what has been done, the legal irresponsibility which might be constitutionally secured to him cannot be expected to shelter him from discontent: so that this method of restoring harmony of sentiment cannot be completely applied. This danger may be much diminished by skilful management—a "kingcraft" that knows how to give way gracefully, stand firm without causing needless irritation, and energetically lead popular movements that it cannot safely

[1] This question is further discussed in § 11.

resist. But it is evident that want of statesmanship in the monarch is likely to be much more harmful in this form of government than in the English form; and if a new constitution were being framed for a modern state, the risk either of such a prolonged conflict as I have described, or of a prolonged misuse of power by an incompetent, irresponsible, and irremovable monarch, would seem to be too serious to run.

Moreover, it seems to me that what I have called Simple Constitutional Monarchy must always have a certain tendency to pass over into the English type. For the control over administration which must, I conceive, be allowed to the representative assembly, if its control over taxation is to be a reality, is so considerable, that a monarch who wishes to get any expensive plans carried out will always find it more convenient to manage Parliament than to fight it. He will thus be led to take as his first minister a person who has the confidence of the majority in the house of representatives, to avoid the annoyance and weakness, resulting from friction with the assembly. A minister so chosen, and having consequently so strong a position independent of the monarch's favour, will have a certain tendency to acquire the real control of executive functions. I do not at all mean to affirm that this tendency is irresistible: and I have already attributed to English constitutional monarchy a certain possibility of change in the opposite way; since the large power that it formally assigns to the hereditary monarch seems to offer both temptations and opportunities to an ambitious holder of the office to increase his real power. But in any case the unstable and fluctuating character that thus appears to belong generally to constitutional monarchy must be admitted to be a disadvantage, unless the type of government is regarded as essentially transitional.

§ 9. I conclude, then, that if in a modern state it be desired to give the executive greater stability and independence than can ordinarily be secured to it under Parliamentary Government, some modification of what

Bagehot calls the "presidential system" of the United States is better adapted for the purpose than simple constitutional monarchy. According to this "presidential" system the supreme executive power is vested in a president elected by the people for a term of years; his ministers are incapable of sitting as members of the legislature: and he is enabled to resist hampering legislation by a right of veto, except when a majority of two-thirds is opposed to him. A head of the executive so elected may of course come into conflict with the legislature, which may last till he lays down office: this is the unavoidable defect of such a constitution as compared with Parliamentary government. But as he will have the strength given by popular choice at the outset, and his power is only for a limited time, it is much less probable than in the case of the hereditary monarch that the assembly will adopt the extreme and highly inconvenient measure of refusing the supplies,—even if the constitution gives it an unlimited power of doing this.[1] At the same time the president's inducements to take his ministers from the leaders of the parliamentary majority will be much diminished by the fact that becoming ministers they cease to be leaders.

The separation, however, between the legislature and

[1] This view is confirmed by the recent experience of the United States. In 1867, in the struggle between the Republican party and President Johnson, after the Civil War, Congress began to use its power of granting supplies to control the action of the executive; it did not threaten to refuse supplies, but it tacked as a rider to the Army Appropriation Bill, a bill virtually depriving the President of the command of the army, and placing its management in the hands of General Grant. Johnson protested but signed the bill; his veto would have been useless, as his opponents could have passed the bill over his veto by a two-thirds majority. From this time the practice of tacking measures of general legislation to the appropriation bills went on; but usually not on account of conflict between Congress and President, but as an expedient to get necessary laws passed that might otherwise have been crowded out. In 1879, however, a conflict again arose between the dominant party in Congress and President Hayes, and similar tactics were tried by the former body; but the dominant party had not now the requisite majority of two-thirds: the President resisted, vetoed one appropriation bill after another, and the House of Representatives gave way.

the executive seems to be carried too far for convenience in the United States. It would seem better that the ministers should have the function of speaking [1]—though not the right of voting—in the legislature, in order to afford them the opportunity of explaining and defending executive acts that excite criticism, and co-operating in certain kinds of legislation. The president should have this right also, in order that this communication with the legislature may not gradually transfer supreme executive power from him to his ministers.

We have further to observe that an executive appointed for a fixed period need not be monarchically organised, as the Federal Executive of the United States is.[2] It would be quite possible to have a supreme executive organised like the English cabinet,—or even one of which the members were practically more on an equality,[3]—elected for a fixed period [4] by the legislature: though I think that, *ceteris paribus*, a higher standard of administrative efficiency is likely to be maintained if the heads of departments are appointed by a single head—whether this head himself be elected by the legislature or directly by the people. In any case the fixed period should be, if possible, sufficiently

[1] There is nothing in the constitution of the United States to prevent this; though it has never been done since Washington's days. See Bryce, *American Commonwealth*, Part I. chap. ix.

[2] It is for this reason that I have not been able to use Bagehot's conceptions of "Cabinet Government" and "Presidential Government," except in a quite incidental way: since they seemed inevitably to mix up two questions which I wished to keep distinct,—the question of the relation of the executive to the legislature, and the question as to the more or less monarchical organisation of the executive.

[3] In the English system, the equality of members of the cabinet, even if constitutionally established, could hardly be more than formal: since, when any serious disagreement between Cabinet and Parliament leads at once to the resignation of the former or the dissolution of the latter, individuals who have predominant influence in the House and the country must tend to have correspondingly predominant influence in the cabinet. But if the cabinet were separated from the legislature and appointed for a fixed period, the equality of voting power that might be secured to each member would have a much more substantial significance.

[4] The Swiss Federal Council exemplifies this system: except that it has less independence than I should propose to give to the executive.

long to gain the advantages of stability, and yet not long enough to weaken the sense of responsibility materially.

By such a system some of the most serious disadvantages of parliamentary government would be avoided; especially if independence were further secured to the executive by a permanent ordinary budget—or at least one fixed for the whole duration of its tenure. In this case, even if the executive were appointed by the legislature, the motive for ambitious intrigues and combinations in the assembly would be much diminished, since they could have no immediate or certain effect in ousting the executive. And for a similar reason the executive would not be liable to be overthrown by sudden drifts of opinion within or without the assembly: its administrative conduct during the fixed period would be judged as a whole at the expiration of the period.[1]

The system above described may be distinguished as that of a Periodical Executive; as compared with Parliamentary government, it would, as I have said, necessarily have one disadvantage,—the danger of a temporarily insoluble conflict between the legislature and the executive. To reduce this disadvantage to a minimum, it would seem better that the executive should be elected by the legislature than by the country, as then the two organs would at any rate begin with harmony. This would not materially diminish the independence of the executive; as it would not be dismissible by the legislature, and would not be re-elected—if at all—by the legislature that elected it.

In discussing the relation of the executive to the assembly of representatives, I have attached importance to the power possessed by the former of dissolving the latter. If harmony between cabinet and assembly is aimed at, on the principle that either is to give way if the other is supported by the electorate, then to give the cabinet the right of responding to a vote of "no con-

[1] It will be argued in the next chapter that a Periodical Executive is better suited than Parliamentary government to the traditional method of constituting the legislature of two co-ordinate chambers.

fidence" by a dissolution seems to be the simplest and most effective way of attaining the desired end. But if the executive is not to be displaceable by the assembly, the advantage of allowing it to dissolve the latter seems at least doubtful; since the chance of restoring harmony by obtaining an assembly in agreement with the executive is balanced by the danger of greater strain on the constitution if the new parliament agrees with its predecessor,—the dissolution is then liable to have the air of an appeal to a judge whose decision is afterwards defied. It may, however, be thought desirable that the head of the executive—whether a president or a king who governs as well as reigns—should be fixed, permanently or for a considerable period, but should change his policy if it be disapproved by the people as well as by the assembly. If so, no doubt the people's sentiments might be conveniently tested by a dissolution; but if the system is intended to be stable, it would seem better for the monarch to ascertain them otherwise; since a change of policy is likely to involve a change of ministers, and if such a change were palpably and repeatedly forced upon a monarch in consequence of dissolutions, it would be difficult to prevent the substance of executive power from passing to the leaders of the parliamentary majority. It would rather seem that, in the case last supposed, "kingcraft" would be best shown in anticipating a strong tide of popular aversion, and dropping an unpopular minister with apparent spontaneity.

§ 10. An important question under the present head is to determine what share of strictly legislative functions it is needful or convenient to allow to the executive; in considering which the duration of the legislature becomes important, in respect not of its *terminability* but of its *continuity*. We have seen it to be expedient that the executive should have some legislative powers on matters requiring regulations that vary from time to time according to circumstances; but that, for the security of the citizens at large, such powers—so far as they affect others besides the servants of government—should be ordinarily exercised for certain strictly defined ends, within limits fixed

by the legislature.[1] But I have admitted that unforeseen occasions may arise, when the public welfare requires that the executive should act, in issuing commands, beyond its defined powers. The question then is how such salutary encroachments may be provided for with the minimum of harm or danger.

There are two different ways of dealing with the problem: (1) It may be made the duty of citizens to obey all ordinances of the supreme executive, whether they are legally authorised or not, while the executive is made liable to penalties for issuing orders beyond its legal authority, unless its liability is *ex post facto* removed by the legislature. This, however, seems a clumsy method, tending to confuse and impair, in the citizens at large, the combined habits of respect for law and resistance to illegal coercion, both of which are important for the wellbeing of the community. (2) It would seem better to give the executive a general power of issuing ordinances having legal force without special authorisation; but subject to the restrictions that it is only to be exercised in case of urgency, that such ordinances are to be communicated as soon as possible to the legislature, and that they cease to be valid if disapproved by that body.[2] It is here that the question of *continuity* in the exercise of functions by the legislature becomes important: since so long as Parliament is in session it can only be in very exceptional circumstances that the executive can have plausible grounds for acting without previous authorisation; while if such an exceptional occasion did arise, the legislature could disapprove promptly of any oppressive or unwarrantable ordinances issued by the executive. If, on

[1] See chap. xix., especially § 8. "The substance no less than the form of the law," says Mr. Dicey (*Law of the Constitution*, chap. i.), "would, it is probable, be a good deal improved, if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the acts of the legislature."

[2] If the legislature consists of two chambers, disapproval by either chamber should be sufficient to invalidate: otherwise the law might be modified to any extent by the executive together with the majority of one chamber, which would be contrary to the principle of the two-chamber system.

the other hand, there are considerable intervals between sessions of the legislature, the power thus given to the executive increases in dangerousness in proportion to the length of the intervals. Actually in all modern states, it is customary for legislative assemblies to suspend their sittings for a considerable portion of each year: and the custom is defensible; since the making of changes in laws is not necessarily a continuous function; and representatives removed for the whole period of their tenure —even allowing for the brief holiday necessary for health —from the districts that they represented would be liable to lose touch of their constituencies; also the greater onerousness of the prolonged severance from home and private affairs might inexpediently restrict the choice of legislators. If then, for these or other reasons, there is a considerable part of the year in which the legislature is not sitting, an unlimited right of issuing ordinances which have the force of laws during this period seems too formidable a power to grant to the executive. To obviate this danger the executive should be bound to summon the legislature for an extraordinary session at least simultaneously with—if not before —the issue of any ordinance which it has not been specially authorised to issue.

It is a different question whether the executive should ever have the power of infringing the legal restraints under which its function of maintaining order is normally exercised—*e.g.* by arresting and detaining at its discretion persons suspected of dangerous designs. It seems rash to deny that the exercise of such powers, even without special authorisation, may be advantageous in a disturbed condition of society: but we may reasonably require that such exceptional powers should only be assumed when there is—if not actual war, foreign or civil—at least imminent danger of violent and dangerous disorder; and, of course, that the authorisation of the legislature should be as soon as possible obtained for the continued exercise of such powers.

The assumption by the executive of the right of inflicting punishment as such, without the ordinary process of

trial by an independent court of justice, can, I conceive, only be defended as a military measure, in time of actual war, within the range of military operations.

If parliamentary sessions are discontinuous, the question arises how their duration is to be determined, apart from the case of dissolution. Under the English system, as the main legislative business of Parliament is prepared and managed by the executive, the opening and closing of parliamentary sessions is naturally left to the latter organ; and it is generally unimportant by which of the two organs it is formally determined, since they are normally in agreement. If, however, the executive is not dismissible by the legislature—and especially if it is not dependent on the legislature for an annual supply of the funds required for ordinary expenditure—it becomes important that it should not determine the duration of parliamentary sessions. On the other hand, to fix the period of session by a rigid rule seems inconvenient, as the amount of urgent legislative business may vary much from time to time; but it might be well to have a minimum period fixed by a permanent law for ordinary annual sessions, while giving the legislature a power of prolonging it, and of holding extraordinary meetings at its own discretion or at the summons of the executive.[1]

If the executive is independent of the legislature, it should have the constitutional right of proposing new legislative measures to the latter; since, for certain kinds of legislation, an intimate co-operation between the two organs is expedient, if not indispensable. Where, however, the cabinet is normally composed of members of parliament, this right becomes practically superfluous: here the important question

[1] This would seem to be specially desirable if the system of two chambers be adopted. It should be borne in mind that the powers of the legislature may be legally limited, even if there is only a single legislative chamber, (1) by requiring the assent of the supreme executive to new laws, or (2) by constitutional rules not capable of being changed by a simple majority of the legislative body. The former method, however, is not really available under Parliamentary Government; the latter method will be further considered in a subsequent chapter (xxvii.).

rather is how far it is expedient to leave to the executive cabinet the preparation and practical management of the legislative work of Parliament. The arrangement is clearly advantageous where the proposed legislation is closely connected with executive functions, so that one or other of the executive departments is a natural dépôt of experience on the matters in question; and it is probably inevitable, wherever Parliamentary government is worked on the two-party system, as regards all questions on which the parties are understood to disagree. But there remain important kinds of legislation—for instance, in the department of private law—with regard to which the executive as such has no claim to special knowledge; and which are even now to some extent—and might be to a greater extent—declared outside the arena of party conflict. It would seem that the management of such legislation might with advantage be entrusted to a committee other than the cabinet, so as to diminish the danger of overburdening the executive with legislative work; of which committee the chairmen of the standing committees appointed to deal with different departments of legislation would naturally be members.

In financial matters there is a special advantage in leaving the initiative entirely to ministers, as they are in the best position for enforcing economy in expenditure, and are more likely to enforce it if the responsibility for financial proposals rests entirely on them. If this plan is not adopted, it will be at any rate indispensable to provide that no proposals involving a material addition to the public expenditure should be brought before the legislature without being referred to the same committee that is responsible for proposals relating to taxation; in order that no expenditure may be undertaken without due consideration of the relative importance of the need it is designed to meet, as compared with other public needs and with the public resources.

§ 11. It remains to inquire how far the legislature in its turn can or ought to be restrained, either by law or by definite customary rules, from the excessive interference with executive work which we have recognised as a danger.

In discussing this question, it will be convenient to consider separately (*a*) the regulation of the mutual relations of members of the community other than servants of government treated as such, (*b*) the organisation and management of the executive service, (*c*) the management of foreign affairs. The first of these constitutes the primary sphere of normal legislative activity, which we have had chiefly in view in constructing the legislature on the representative system. Here I have already[1] recognised, as a generally sound maxim, that the general rules to be enforced by Government should be discussed and determined apart from their particular application, in order that they may be afterwards carried out without "respect of persons." It is obviously just and expedient that no individual, group, or class within the community should be arbitrarily subjected to special legislation, where there are no peculiar circumstances to justify exceptional treatment. But where such peculiar circumstances appear to exist, it does not seem either just or expedient to prevent Parliament from framing particular legislative provisions with a view to them. Hence constitutional rules[2] against "special legislation," even supposing that they can be made effective, seem to me a clumsy and unsatisfactory method of guarding against injustice and jobbery.

A noteworthy case of such special legislation is the class of measures by which powers of compulsory purchase of land, and other privileges, are granted to industrial companies formed to supply some important social need—such as the need for canals, railways, tramways, or for water or artificial light. If the general expediency of thus rendering governmental aid to a certain kind of industrial enterprise is held to have been established, and if the general conditions under which the required powers or privileges ought to be granted can be decisively laid down, then it certainly seems most proper that Parliament should confine its action

[1] See chap. xix. § 8.

[2] Such rules are common in the American State Constitutions. See Bryce, *American Commonwealth*, Part II. chaps. xl. xliv. and xlv.

to the laying down of these general conditions, leaving it to some executive[1] body to deal with the particular applications of particular companies. When, however, a new departure is being made in this semi-public organisation of industry, it may often be the wisest course for the legislature to proceed tentatively, and not to separate its general regulations from their special applications in particular instances, until a certain amount of experience has been gained of the methods and effects of the novel enterprise.

(*b*) As regards the organisation and management of the whole executive organ, it clearly falls within the province of the legislature to define the powers of the officials, and to determine what special privileges or liabilities it may be for the public advantage to allot to or impose on any class of the servants of government as such, and, generally, to lay down the conditions of appointment and tenure of executive offices. And it would seem that experience alone can determine the degree of minuteness to which the financial control exercised by the legislature over the executive should be carried, so as to secure the *maximum* of economy without impairing the general efficiency of the organ, or its power of promptly meeting sudden calls for special activity. On the other hand, for reasons before given, the legislature should be prevented, by law or custom, from interfering in the selection of individuals to fill vacant posts, or in the particular allotment of tasks to them, within the range of the business assigned to the department to which they belong.

(*c*) It is not easy to establish a satisfactory distribution of functions between the two organs in relation to foreign affairs. There is usually little room here for the exercise of legislative functions in the way of laying down general rules, and, as we have seen, the direct intervention of a numerous repre-

[1] The work is primarily of an executive character, because it consists in balancing considerations of public expediency, not interpreting rules of strict right. But the determination of the amount of compensation payable for any infringement of pre-existing rights that may thus be legalised is a strictly judicial matter, and should not be determined by the executive, but referred to arbitration or judicial decision. The executive body concerned may be either a department of the central executive or a local executive organ.

sentative assembly in the management of particular questions in this department is not likely to be advantageous. At the same time, there are certain decisions of fundamental importance to which the consent of the supreme legislative and money-granting organ seems indispensable. Thus, the control of the organ over finance would be seriously impaired if treaties of commerce, regulating the taxation of imports from certain countries, could be made without its consent. War, again, from the additional expenditure that it entails, must require the active co-operation of the money-granting organ; and, again, it seems right that the consent of the legislature should be necessary to the validity of any change in the territory for which it has the constitutional duty of making laws. Perhaps the best arrangement would be that the consent of the legislature should be required, as a general rule, for making war, or ceding or annexing territory, or making treaties that pledge the State to any such measures or that otherwise affect materially the financial liabilities or resources of the State: while at the same time certain acts falling under this rule should be allowed to be validly performed by the executive without such consent if, in the opinion of the latter, the delay and public discussion that the ordinary procedure would involve would be injurious to the public interest. It should be further provided that whenever the executive found it necessary to act thus on its own responsibility, its action and the grounds for it should be communicated as soon as possible to the legislature for its approval. This would, however, still leave it possible for the executive to make binding engagements, which might be kept secret for an indefinite time. If this seemed to be too great a power to leave to the executive, the need of occasional secrecy might be partly met by appointing a small Foreign Affairs Committee of the legislature, who might have the constitutional right of being informed at once of *all* engagements made by the executive with foreigners, and whose approval should be necessary to the validity of the secret engagements. I think, however, that it would be generally better to trust the executive, in order that re-

sponsibility for difficult and delicate negotiations may be concentrated on the persons who have the actual management of the affairs.

Finally, one important function of the legislature is to make or direct systematic inquiries into matters on which information is needed, either with a view to legislation, or for critical supervision of the executive. It should therefore be the general duty of the latter to assist such inquiries by furnishing information: but it should not be compelled to disclose anything which it is for the public interest to keep secret.

§ 12. So far I have considered the mutual relations of the legislature and the executive, regarded in their corporate capacity. But, before concluding, it is necessary to consider the danger of undue influence exercised by the supreme executive on members of the legislature, since important restrictions on eligibility to Parliament have been introduced into modern constitutions in order to meet this danger.

Such undue influence, which may take the form either of intimidation or bribery, is more formidable in proportion as circumstances render it easy to exercise and difficult to detect; and there would obviously be special facilities for exercising it on subordinate executive officials if they were elected members of the legislature. Even granting that public opinion would secure any such official from dismissal for voting against the wishes of the supreme executive—which can hardly be certain—at any rate the hope of promotion would be a motive impossible to exclude. It would seem therefore expedient that subordinate members of the executive should be generally incapable of sitting in Parliament; for they are likely either to be too subservient to their chiefs, or, if not, to be forced into a public opposition to them, tending to destroy the harmony that should exist between the head of a department and his subordinates. Further, if the working of the executive is economical and efficient, it is hardly likely that salaried subordinate officials will have enough spare time and energy to be good members of Parliament. Moreover, such persons are liable to have

private interests—or an *esprit de corps*—opposed to economy in the organisation of the executive. I conclude, therefore, that the executive posts tenable by members of the Legislature shall be limited to such as appear to be required, under Parliamentary government, as a link between the two organs.

Some bribery may still be exercised by giving appointments to persons who have been members of Parliament. This might be largely obviated by making it illegal to give paid governmental employment to any person who either is a member of Parliament, or has been one within a certain period previous to the appointment,—exceptions being made in the case of posts for which the work of Parliament seemed a specially good preparation, or specially adapted to test qualifications.

The possibility of bribery by pensions ought not to be important, if adequate financial control is exercised over the executive; since the only pensions given should be either (1) earned in the ordinary course of governmental service, or (2) specially awarded in recognition of eminent merit; and in neither case ought they to be subject to withdrawal at the discretion of heads of departments.

Finally, while freedom of speech in Parliament should be specially guarded by law, it hardly seems that any special protection of members of Parliament, against misuse of the power of the executive to arrest law-breakers, ought to be necessary in a State in which ordinary citizens are adequately secured against this kind of oppression. Perhaps, however, a power of exercising such protection might be advantageously secured to the legislative assembly, for use if the occasion should arise.

## CHAPTER XXIII

### TWO CHAMBERS AND THEIR FUNCTIONS

§ 1. THE division of governmental functions into legislative, executive, and judicial, which has so far formed the basis of our discussion of governmental structure, is not merely suggested by the historical separation of the corresponding organs, which might plausibly be represented as an accidental result of special causes operating on a particular system of states during a particular period of their development: it appears to belong to the essential nature of law and government, at least from the time that the former has come to be regarded as normally modifiable by the latter. The business of changing the general rules by which the relations of citizens (so far as compulsory) are determined, the judicial application of these rules to particular cases, and the performance of the coercive and industrial work of government within the limits which such general rules define,—we can hardly conceive that these will not always remain operations broadly distinct in their character, and requiring, for the most part, different kinds of intellectual and moral qualifications in the individuals and bodies to whom they are entrusted. And the general tendency to specialisation of functions which characterises the development of civilised societies affords a presumption in favour of a continually more marked separation of these branches of governmental work,—at least so far as the most important matters are concerned,—however intimate and complex may be the relations among the organs to which these functions are severally entrusted.

The case is different with the other threefold division, which, in West European states, is widely regarded as no less normal and universally expedient than that which we have been discussing: I mean the distribution of legislative power among "Crown, Lords, and Commons,"—to use the old English terms. We have seen, indeed, that, if the executive is to have any substantial independence within the limits of the law, it should have some means of resisting new hostile legislation, such as is given by an effective veto—whether absolute or qualified; unless, as in the English system, the main work of legislation, together with the supreme executive power, is entrusted to a committee of the legislature, with authority to dissolve the legislative assembly and appeal to the constituencies: otherwise it seems difficult to prevent a legislature in conflict with the executive from passing laws so minute and detailed in their provisions as almost to nullify the independence of the executive. But I know no similarly conclusive reason for complicating the legislative organ by the introduction of a second chamber: and the complexity is certainly in itself an objection;—a proposal to establish a three-chambered legislature would be generally rejected without hesitation, merely on account of its complexity. There is, however, a decided preponderance of opinion—even where representative institutions are fully developed—in favour of instituting a supplementary chamber, which I shall call the Senate, whose co-operation with what I shall call the House of Representatives[1] should be normally necessary for the passing of laws: though, as to the exact grounds on which such a chamber is desirable, and the relation in which it ought to stand to the other chamber, we find much divergence.

In the weightiest arguments urged in favour of two chambers, the mere *duality*—with adequate dissimilarity—of legislative bodies appears to be the important point, rather than any particular character or quality which the

[1] It is difficult to find clearly distinctive terms for the two chambers, since, as we shall see, the members of both may be periodically elected. The American names that I have adopted seem to me on the whole most convenient.

members of the Senate are intended to possess: stress being laid on the completer discussion of proposed laws which is thus obtained, the protection against the passions which are more likely to affect a single body than two, the check on the temptations which the consciousness of possessing supreme power carries with it. As regards the last of these points I am inclined to think that, in the English system of Parliamentary government, the evil effects of the mere intoxication of power—so far as these are supposed to be manifested by the governing organs as distinct from a predominant faction of the electors—are adequately guarded against, in the House of Representatives no less than in the Cabinet, by the check which each exercises on the other, and especially by the appeal to the people that is at any time possible. At the same time, the danger of encroachments by the legislature on the functions of the executive is undoubtedly diminished by the existence of two legislative chambers, as this necessarily maintains a broad and palpable distinction between the resolutions of either chamber and binding laws. And, more generally, the danger of hasty legislation in harmony with popular opinion—from which no form of parliamentary government is free—is reduced by securing a rediscussion of all proposed legislation, by a body independent of either the House of Representatives or the executive: and some protection is also afforded against a sinister combination of private interests to pass measures opposed to the public good; since such a combination is at any rate more easily managed in one chamber than in two. That these advantages may be realised, it is of course necessary that the senate should actually have sufficient prestige and influence to enable it effectively to modify legislation: and the gain will clearly be greater the more the mode of appointing its members tends to secure in them, on the average, such legislative qualifications as are likely to be most lacking in the primary chamber.

This last consideration is obscurely included in a prevalent view of the upper chamber which regards it as

required to give adequate representation of the aristocratic element of the community, in order to balance the undue preponderance of the masses in the House of Representatives. The notion of "aristocracy," however, as thus used, commonly combines the attribute of superiority in general culture and political enlightenment with that of inherited wealth—especially landed property—considerable in amount. But it is important for us clearly to distinguish these two attributes; since, though the leisure and opportunities which large wealth brings with it have a certain tendency to produce culture and enlightenment in their possessors, this tendency is seriously counteracted by the temptations to idleness and self-indulgence which beset the rich: and we should certainly construct a legislative chamber otherwise if our single aim was to make it adequately representative of the best culture or highest political enlightenment in the country, than if we aimed at making it adequately representative of the class of rich men or rich landowners. And, though I recognise the danger that a House of Representatives, elected on a widely extended suffrage, may pass bad laws hostile to the interests of the rich, I do not conceive that the institution of a second chamber, avowedly representative of wealth, is likely to be a permanently effective way of meeting this danger; on account of the specially marked and invidious opposition between wealth and numbers which it introduces. I think that a wise partisan of the wealthy minority, in framing a new constitution for a modern country, would accept as a principle of construction that a senate ought to represent superior culture or political enlightenment rather than wealth.

§ 2. Taking, then, the main end for which a senate is constructed to be that all legislative measures may receive a second consideration by a body different in quality from the primary representative assembly, and, if possible, superior or supplementary in intellectual qualifications, let us consider (1) in what relation such a chamber should stand to the House of Representatives; and (2) how its members should be appointed. Of these questions the first should have

prior consideration, since the answer given to it must to some extent determine the answer to the second question.

The most obvious and simple arrangement is to make the two chambers co-ordinate, with equal powers; so that the free consent of both shall be necessary to any binding decision of the legislature; and, therefore, if either house refuse its consent to any proposed legislative measure, it must drop or be postponed. Now there would seem to be ordinarily[1] little danger of harm in the postponement of a proposed law, provided that the judgment of the senate on the merits of the law is, and is generally considered to be, as good as that of the primary representative chamber: in this case a conflict between the chambers would usually have only the effect of deferring legislation, of which the advantage is at best doubtful. The case is, however, different as regards financial control, if—in order that this control may be as complete as possible—the provision even for fixed and necessary expenditure is only determined for short periods. For in this case the budget cannot be postponed, as most new laws can; so that if the two chambers disagree either as to the mode of raising funds by taxation, or as to the appropriation of the funds to different branches of expenditure, there is a danger of a deadlock.

To meet this difficulty—otherwise than by relying on the wisdom and moderation of both chambers—we must sacrifice either (*a*) the *duality* of the chambers, or (*b*) the equality of their powers, or (*c*) the extent of their financial control. (*a*) It may be provided that, in case of disagreement between the chambers on a financial question, the point shall be decided by the majority of votes in the two chambers taken together: but this—besides rendering the two-chamber system *pro tanto* a superfluous complication—also tends to diminish the security of the taxpayers, unless the Senate is equally trusted as guardian of the public purse. (*b*) The knot may be cut by confining the financial control to the House of Representatives,—as it is practically

[1] In exceptional cases the disadvantage of delay might be greater; see chap. xxvii. § 3.

confined in England, where the upper chamber has only the power of accepting or rejecting financial measures *en bloc*, not of initiating or modifying in detail;—but this method, of course, gives a very decided preponderance of power to the chamber that possesses this control. (*c*) The danger may be reduced by settling ordinary taxes, and the appropriations for ordinary expenditure, permanently as far as possible; so that a disagreement between the chambers may not deprive the government of absolutely necessary supplies; but this expedient would not certainly be adequate, unless the executive had also some power of imposing supplementary taxes on its own authority, since the returns from the fixed taxes in any year might prove insufficient to meet the fixed expenditure.

Supposing the question of financial control to be settled somehow, no further difficulty is introduced by the two-chamber system as to the relation of the executive to the legislature if the former's tenure of office is independent of the latter: indeed, in this case, the division of the legislative organ into two bodies with equal powers is likely to be useful as tending to protect the independence of the executive, by rendering encroachments on the part of the legislature more difficult—assuming it to be the design of the Constitution to maintain the executive in effective independence.

On the other hand, the system of two really co-ordinate chambers does not seem to be suited to any form of Parliamentary government: because a conflict between the chambers tends to destroy the harmony between legislation and administration, which appeared to be the characteristic merit of this form of government. For, if the two chambers are to have equal powers, the dismissal[1] of the executive could

[1] I have not thought it right to assume that the power of dismissing the executive is inseparably connected with financial control, though it actually is so connected in the English Constitution and others formed on its model; since it is quite conceivable that the two should be separated. Of course if there is an annual budget, and a refusal of necessary supplies is regarded as a legitimate exercise of the financial control of the money-granting organ, the latter must have the power of dismissal. But, as I have before suggested,

only be effected either (1) by concurrent resolutions of the majorities in the two chambers, or (2) by a resolution of the majority of the whole body formed by uniting the two. In the first case, it is obvious that so long as the two chambers are in conflict the dismissal is not likely to be effected; while, on the other hand, the executive may be unable, for an indefinite time, to obtain legislation that it considers vitally important. Nor would it help matters to unite the chambers into one body for the purpose of appointing and dismissing the executive, so long as the duality is retained for the purpose of legislation. Nor would a termination of the conflict be certainly attained by allowing a simultaneous dissolution of both chambers,—supposing them both to be elected—unless they are elected on methods so similar that they are sure to agree immediately after election: in which case the ends aimed at in the two-chamber system would hardly be attained at ordinary times. Nor again, could a solution be arrived at by the English plan of giving the right of dismissing the executive to the House of Representatives alone—balanced by the executive's power of dissolving the House—so long as the co-ordinate position of the Senate was really maintained in legislation. If, however, so great an inequality of powers between the two chambers were introduced, it would be practically difficult to maintain the Senate's position; owing to the pressure that would be put on the Senate to yield to the "verdict of the people" whenever the executive and the House of Representatives, after a dissolution, were agreed in desiring a new law. If the Senate resists this pressure the discontent and constitutional friction generated are likely to be a serious evil; if it gives way against its real judgment, its power of performing its functions

ordinary expenditure might be settled by a budget that would remain in force if not modified by agreement between the legislature and the executive; or, again, it might be regarded as an improper use of financial control to compel ministers to resign by a refusal of the supplies necessary for such expenditure; and, on the other hand, it is quite conceivable that the constitutional right of dismissing the executive should be given to the legislature directly, without any refusal of supplies.

effectively will not be assisted by its formally co-ordinate position.

It appears to me, therefore, that a co-ordinate second chamber is an alien element in Parliamentary government when fully developed. In a country like England, where the existing distribution of power is the result of a process of gradual change, a second chamber invested formally with co-ordinate powers, but practically restricted in their exercise by custom and opinion—with the Crown's right of creating new peers as an ultimate control[1]—may work tolerably well. But if, in framing a new constitution, we desire to combine the advantages of a two-chambered legislature with those of a Parliamentary executive, it would seem better to recognise formally the subordinate position of the Senate by limiting its power of resisting a legislative measure approved both by the House of Representatives and by the people. It is, however, difficult to devise a limitation which shall be effectual without going too far: for instance, to make the functions of the Senate merely consultative in respect of any measure approved by the House of Representatives in two successive parliaments would probably too much reduce its power of resistance. A better method would be to allow a direct vote of the electorate to be taken on any measure rejected by the Senate in three successive years: this would have the advantage of obtaining the decision of the citizens at large on the particular issue disputed between the chambers, more clearly than it could be obtained by a general election of representatives: since the choice of representatives ought not to be, and probably never would be, entirely determined by their opinions on a single measure.[2]

If, however, the advantages of intimate connection and harmony between the legislative and executive organs are sacrificed to obtain the advantages of greater stability and clear separation of functions—as appears to be the case

[1] I do not mean to imply that the use of this power to coerce a hostile majority in our House of Lords would not be semi-revolutionary. See chap. xxxi.

[2] On the intervention of the citizens at large in legislation, see chap. xxvii.

under any form of government in which the Supreme Executive holds office for life or for a fixed period—I see no reason why the Senate should not be so far really as well as formally co-ordinate, as to be able to offer effectual resistance to legislation which it regards as pernicious or dangerous.

§ 3. Supposing that this real power of resistance is desired, it is important to appoint the Senate in a manner that will make it practically strong enough to hold its own in a conflict with the House of Representatives. The application of this principle will vary considerably with the varying historical traditions of different societies. But I think that the desired result is not likely to be obtained in a community where there is a House of Representatives freely elected and in full consciousness of its power, unless the members of the Senate have also the strength given by popular election. I fully admit that the opinion of a Senate composed of distinguished men nominated for life by the executive, or appointed *ex officio* as holding or having held for a certain period important executive or judicial posts, is, under ordinary circumstances, likely to have weight with the public; and may be effective in checking from time to time dangerous drifts of popular opinion. But suppose that such a chamber has expressed its opinion and has not persuaded the public: then, surely, the sight of a handful of individuals, presuming on the score of their personal superiority to resist permanently the "will of a people" whom they are unable to convince, is likely to rouse popular indignation and clamour, and to cause at least a dangerous strain on the constitution. I think that a second chamber, in order to be able to maintain a really co-ordinate position against the pressure of a popularly elected assembly, must itself be also in some way, though perhaps indirectly, the result of popular election.

It is not, however, easy to find a satisfactory mode of election, calculated to furnish a Senate at once strong in popular support and sufficiently different from the House of Representatives to realise the full advantages of the two-

chamber system. Election by the House of Representatives itself is one obvious method; but it hardly seems likely to produce a sufficient degree of difference in the quality of the two chambers. On the other hand, a senate elected by or from a limited class of citizens would, in any conflict with the primary representative assembly, be open to the invidious charge of contending for sectional against national interests.[1] Election by persons who are themselves elected by the people at large is free from this objection and has much to recommend it: but unless the intermediate electors have other important functions, they would be liable to become mere puppets—elected under strict pledges to vote for particular individuals,—as is actually the case with the electors to the Presidency in the United States at present. This leads us to the plan of election by elected local governments, which is actually adopted with some success in the appointment to the senate in the United States.[2] It is, however, doubtful whether this plan is likely to succeed equally where the local governments are less dignified and important than they naturally are in a Federal system: and in any case the plan is open to the objection that it tends to introduce alien considerations into the election of local organs of government.

Perhaps, in general, the best result would be attained by combining a number of minor differences, and providing that the members of the senate should be (1) fewer in number and so chosen from larger districts, (2) appointed for a longer period, and (3) on the plan of partial renewal. As regards this last point I may now observe that, in discussing (in chap. xx.) the conditions of election of a representative assembly, I omitted to consider whether such an assembly should be elected all at once—except in the case of accidental vacancies—or only renewed in parts, a certain number of seats being vacated and filled up at each new election. I

[1] This objection remains strong, even if the limit is educational, not pecuniary; owing to the inevitable tendency of superiority in education to be connected with superiority in wealth.

[2] The importance of this mode of election, in a Federal system, will be explained in a subsequent chapter (xxvi.).

deferred this question, because the answer to it seemed to depend partly on the relation between the executive and the legislature, partly on the choice made between one and two chambers. There seems no doubt that simultaneous renewal is the only method suitable, where it is important that a dissolution of the representative assembly, and a consequent appeal to the people, should be at any time possible: the appeal could not otherwise receive a clear and decisive answer. But in order to get the full advantages of the system of two chambers, with co-ordinate powers, it seems desirable that they should be elected on different plans, in respect both of extent of renewal and of duration of powers; so that while the primary representative chamber, being chosen all at once for a comparatively short period, may more freshly represent the opinions and sentiments of the majority of the electorate, the senate, elected for a considerably longer period, and on the system of partial renewal, may be able to withstand the influence of any transient gust of popular passion or sentiment.

If, however, the Senate is only designed to have the power of delaying objectionable legislation, and enforcing ample consideration of the objections urged against it—we shall rather seek to obtain a body of persons whose judgments are likely to be received with respect, from their individual merit and experience: and in this case appointment *ex officio*, supplemented to a certain limited extent by nomination for life by the executive, has much to recommend it. Some combination of these members seems preferable to co-optation in any form: since a co-opting Senate would be liable to be unduly swayed by the intriguing of cliques and the exclusiveness of party-spirit, and still more liable to odium through a general belief that it was so swayed. Or one or both of the methods above mentioned might be combined with that of election by the organs of local government,—the objection to which is less when the legislative power of the senate is reduced, since in this case the members of local governments are less likely to be elected with a view to their elective function.

I have not spoken of *heredity* as a mode of determining the membership of the senate. It must, I think, be considered a survival from an earlier stage of social development: no influential statesman has ever suggested it, so far as I know, for any of the new communities founded by Englishmen in America and Australia: nor has it been adopted in the European constitutions framed most under the influence of modern ideas—in France, Belgium, and Holland, or in the Scandinavian countries, or in Italy. On the whole, I think it can now hardly be counted among methods requiring to be seriously considered in constructing a second chamber for a modern community, in which birth is generally disregarded in the allotment of executive and judicial functions. The chance of obtaining superior intellectual qualifications, through physical inheritance, in the sons of statesmen, though it must be allowed to be worth something, is too indefinite and uncertain to be worth much. Again, a hereditary legislator has special opportunities of obtaining the best educational preparation for a statesman's career, and of imbibing the results of political experience in the intimacy of domestic and social intercourse; but these advantages would seem to be, on the average, at least balanced by the temptations incident to rank and wealth, and the absence of the spur to sustained intellectual effort which economic necessities or social ambitions supply to youths of humbler origin.

To sum up, then: assuming that a Senate is desirable, I should reject as generally inexpedient modes of appointing senators — under the social and political conditions of a modern state—co-optation, inheritance, and those modes of election which manifestly render the elected chamber representative of a *section* of the whole body of citizens. Among the acceptable modes of appointment I should distinguish (1) those that aim at securing *personal* weight in the senators; and (2) those that aim at securing *representative* weight. I should place in the former class nomination by the executive, and appointment as a consequence of holding or having held for a certain time certain high offices. In

the latter class I should include all modes of election which would render the persons elected representative in some way of the whole body of citizens. The methods included in the first class appear to me well adapted for the purpose of providing a chamber that is only designed to have the power of delaying, and not that of permanently resisting, the legislative measures approved by the primary representative assembly: but if a chamber with really co-ordinate powers is wanted, I think that the weight required for the conflicts it must be prepared to face is most likely to be secured by some method that will render it undeniably representative, though possibly in an indirect way, of the nation at large. And of these two kinds of relations between the two chambers, the former, as I have said, appears to me alone adapted to Parliamentary government: the latter requires, I think, for its satisfactory working some such careful separation of legislature from executive as is realised in the "presidential" system of the United States of America.

§ 4. So far I have supposed the functions of the two chambers to be generally *similar*, even when their powers are not equal. But different arrangement has been suggested as regards the budget: and, perhaps in other than financial matters, the legislative powers allotted to the chambers might conveniently be made diverse in kind, to some extent, by custom, if not by law. Thus, one or other of the two might have the sole function of initiating measures of a certain kind, or of modifying such measures in detail. For instance, where the chief power of determining the substance of legislative changes admittedly belongs to the House of Representatives, the Senate might advantageously have a special responsibility for the work of making the *formal* improvements from time to time required in the law—by removing ambiguities, inconsistencies, and cumbrous superfluities—and for the avoidance of formal defects in new legislation. For this purpose legal experts should be made senators, by nomination or *ex officio*, who might form, alone or along with others, the chief legislative committee of the senate.

2. A similar diversity might be introduced in any functions other than legislative allotted to the chambers. Thus, if a general power of control over treaties with foreign states—otherwise than by criticism and inquiry,—were given to the legislature, it might be appropriately confined to an elected senate constituted as I have above suggested; since, from the longer duration and partial renewal of this chamber, it would be more likely to maintain a farsighted and consistent foreign policy than the House of Representatives.

3. Again, it may be suggested that the senate should be constituted a judicial tribunal for the trial of offences committed by public men of high position in violation of their public trust and duties; the prosecution of such offenders being assigned to the House of Representatives. Both these arrangements were adopted, after the example of England, in the constitution of the United States; and the judicial function of the senate in particular is elaborately and ably defended in Story's well-known work.[1] But, granting that a special court of high dignity is required to deal with offences of this class, and that to construct a suitable tribunal for them is a matter of considerable difficulty, I still cannot think it a good solution of the difficulty to give this judicial work to a chamber appointed primarily for legislative purposes, most of whose members cannot be expected to have had any judicial experience. I cannot think that such a body is likely in any case to be a good court of justice: and the party-system that now prevails in states under popular government must tend to increase its unfitness. I am more inclined to think that—if it be decided to constitute a special court of this kind—the function of selecting from time to time some of the members of the required tribunal might be properly entrusted to the Senate; as it would be well qualified to supply the element of political experience that such a tribunal ought to possess. I shall have occasion to return to this question at the conclusion of the next chapter, which will treat of the judicial organ as a whole.

[1] *Constitution of the United States*, Part III. ch. x.

Further, the legislative powers belonging to the two chambers jointly may be limited by the right of each chamber separately to determine its rules of procedure. This limitation is expedient, partly in order that each chamber may be as free as possible to adopt—and therefore responsible for adopting—the rules best fitted to secure full and fair debate and prevent hasty resolutions, without allowing mischievous obstruction and delay; partly in order to avoid the necessity of subjecting the procedure of either chamber to the control of an external judiciary.[1]

Finally, it should be again pointed out that the legislative powers of both chambers together may be formally limited by constitutional rules, by which certain matters are either positively determined or excluded from the sphere of ordinary legislation. Such rules will, of course, be somehow modifiable; but only by some extraordinary legislative process, under conditions more difficult of fulfilment than those of ordinary legislation, and probably involving—directly or indirectly—the intervention of the citizens at large. The expediency of this distinction between ordinary and extraordinary legislation, and the best conditions for the latter, will be discussed in chap. xxvii. Further, certain legislative powers may be reserved for or delegated to local governments; the reservation or delegation being either (*a*) revocable at the discretion of the legislature, or (*b*) not so revocable. These two cases will be discussed in chapters xxv. and xxvi., on Local and Federal Government respectively.

[1] On the expediency of constitutional restrictions on this freedom of each chamber, see chap. xxvii. § 5.

# CHAPTER XXIV

## THE JUDICIARY AND ITS RELATION TO THE LEGISLATURE AND THE EXECUTIVE

§ 1. THE importance of the Judiciary in political construction is rather profound than prominent. On the one hand, in popular discussion of forms and changes of government, the judicial organ often drops almost out of sight; on the other hand, in determining a nation's rank in political civilisation, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration; both as between one private citizen and another, and as between private citizens and members of the government. To attain this result we require legal knowledge and skill, impartiality, incorruptibility, and independence in the persons forming the judicial tribunals: also that such tribunals should be accessible to all, and sufficiently numerous, and that no one should be hindered, by government or private persons, from seeking judicial remedies for legal wrongs: that, accordingly, the judicial process should be as simple, short, and inexpensive as is consistent with adequate security for justice and adequate provision for the correction of judicial errors; at the same time, vexatious litigation should be discouraged, lest the remedies for social mischief prove worse than the disease. I have not space to enter into the interesting technical questions that arise, in trying to adapt judicial procedure to the attainment of these partially incompatible ends: but we ought to keep these ends in view in discussing the general characteristics of the

constitution and working of the judicial organ in such a governmental structure as we have so far sketched out.

The general reasons for not allotting judicial and legislative functions to the same organ need only be recalled very briefly. The advantages of division of labour, which becomes more important as the complexity and difficulty of law increase with the complexity of society; the importanee of concentrating the main attention of the judge on the impartial administration of law as it is; the different intellectual qualifications required for the making and for the applying of laws;—these have been sufficiently dwelt on in previous chapters. I have also mentioned the advantage of securing impartiality in disputes between legislators and private persons; this no doubt becomes unimportant where popular government is in effective working: on the other hand, it is clear that numerous representative assemblies are especially unlikely to possess the qualifications required for the Judiciary.

This separation of functions, however, must be understood with certain qualifications. Judicial experience, however insufficient by itself, ought to supply a valuable element of the knowledge required for wise legislative changes. Indeed, one advantage of constituting a Senate partly of *ex officio* members is, that it might thus include a certain number of persons who are[1] or have been engaged in judicial work, whose aid ought to be peculiarly useful in the work of freeing the law from formal defects, which we have seen to be specially appropriate to the Senate. If the Senate cannot be made available for this purpose—or perhaps in any case—it would seem desirable to appoint a permanent Law Council,[2] containing persons of judicial experience. It should be the primary business of such a Council to remove inconsistencies and ambiguities in the recognised authoritative statement of the law: but besides this, it might from time to time serve as a channel for bringing judicial ex-

[1] Actual judges to whom this function is given would naturally have less than a full burden of judicial work.

[2] See a *Plan for the Formal Amendment of the Law of England*, by T. E. Holland, M.A., 1867.

perience to bear on legislation whenever this experience clearly pointed to the expediency of material changes in civil and criminal law.

But further; as the varying characteristics of the social relations which laws are designed to regulate can never be completely foreseen by the legislature, it is impossible to prevent the judges from exercising functions that go beyond the mere application to particular cases of rules laid down by the legislature, and practically involve the more precise determination of the law itself. They have to apply rules of law to cases that were not foreseen, and in reference to which therefore the intention of the legislature is not clearly declared; and while it is generally their duty, under these circumstances, to be guided as far as possible, when the meaning of words is ambiguous, by inferences as to the general design of the legislature, drawn from other rules of analogous import, it is still almost inevitable, and sometimes not undesirable, that in drawing such inferences they should be swayed to a certain extent by their own views of what is reasonable and expedient.

It does not necessarily follow that the court which has to decide an unforeseen case should have the power—which English courts have—of laying down a binding precedent to govern all similar decisions hereafter. It may indeed be questioned whether the legislature should not try to prevent the judges from doing this, by declaring it the duty of a judge to give to the words of the law what he thinks their true meaning, without regard to previous decisions. This would render feasible a separation of legislative from judicial functions more complete than the English system admits, would diminish the bad consequences of judicial mistakes, and might perhaps make it possible for citizens generally, other than lawyers, to know the main rules of law by which they were incontrovertibly bound. But it would make it impossible even for the highly-trained expert to foresee decisions on points which a code or statute had left ambiguous; and I think that the greater certainty attainable on details of law at any given time,

that results from judges being bound by precedents, outweighs any advantages of the opposite system.

If the judges are to recognise as valid the precedents of previous decisions, so that a certain amount of legislation under the guise of interpretation is inevitable, the question arises, What precedents are to have this binding force? In a large country, if justice is to be effectually accessible to all, there must be a large number of tribunals with co-ordinate jurisdiction, whether concurrent or locally divided; hence if the law is to be kept practically uniform over the whole country, there must be a single final court of appeal—for all judicial work or for each separable part of it—which alone will have the power of finally determining disputed points of law. It seems, however, desirable that judges of an inferior grade should be provisionally bound by the decisions of those of a superior grade, on points not decided by the final court of appeal.[1]

§ 2. So far I have not supposed the legislature's power of making laws to be confined by any legal limitations. But we have already seen it to be *possible* in any community—and we shall hereafter see it to be *necessary* in a community federally organised, if the terms of the federal union are to have legal precision—to restrict the powers of any ordinary legislature within definite limits fixed by constitutional rules, which can only be modified by some extraordinary legislature or by some process more difficult than that of ordinary legislation. It is further clear that, if such constitutional rules are to have the force of law so long as they are not modified, there must be some body that has the function of deciding whether the ordinary legislature has not transgressed them in its legislation; and that this is *primâ facie* a strictly judicial function. There are,

[1] It does not seem reasonable that a tribunal should be bound by the decision of a co-ordinate tribunal on a point not carried up to the final court of appeal. But, to maintain a clear uniformity in the interpretation of the law, it might be made the duty of a judge who definitely rejects the interpretation of a co-ordinate judge, to communicate his difference, with its grounds, to the court of appeal: which might then decide the point at issue, whether the litigants appeal or not.

however, certain objections against assigning this function to the judicial organ in a unitary state, which will be more conveniently considered hereafter: for the present,[1] therefore, I shall assume that the ordinary legislature—with or without the assent of the executive—has a legally unlimited power of modifying the rules applied by the judiciary: and is not responsible for the use of this power except to the electorate and to public opinion.

But granting that the judiciary cannot question the validity of any law, civil or constitutional, duly made by the Legislature,[2] it may still be the final authority for interpreting constitutional as well as civil law as it actually exists, and applying it to determine any disputed questions of constitutional right. And it would seem that, in most cases, no other body can be so well qualified to exercise this authority. For instance, I conceive that the judiciary should decide disputed questions as to membership of a legislative chamber,—especially when the chamber is elective, and the election is alleged to have been vitiated by bribery, intimidation, or other cause. Such questions eminently require judicial impartiality; and both reason and experience would lead us to regard them as unfit to be decided by the chamber itself or any committee of it; owing to the habits and sentiments of partisanship which cannot be excluded from such bodies.

I conceive, however, that, notwithstanding any danger of partisanship, it should be left to the chamber itself—either acting as a whole or through its chairman or a committee—to administer judicially its own rules of procedure.[3] In particular, it should have power to enforce its rules of order, by silencing or excluding disorderly members: since, for the effective maintenance of order, it is necessary that such penalties should be promptly administered, and no external tribunal is likely to estimate the gravity of breaches

[1] This subject will be further considered in chap. xxvii.

[2] With the consent of the Supreme Executive, if the latter has a veto.

[3] I am here assuming that the chamber is not bound by rules of procedure constitutionally fixed, so as not to be modifiable by the ordinary process of legislation.

of order so well as the members of the chamber. Some limitation, however, of the power of exclusion would seem to be necessary, in order to prevent such a perversion of the representative system as would take place, if this power of excluding members were used so as to enable measures to be passed which would have been rejected if the excluded members had voted—or *vice versâ*.[1] Partly for similar reasons the chamber should also have the right of excluding strangers:—publicity of debate, therefore, though it should be customary, should not be enforced by a constitutional rule: but there seems to be no adequate reason why any attempts to intimidate or interfere with debates, otherwise than by intrusion into the buildings under the control of the chamber, should not, like other offences, be left to the judiciary to punish.

Attempts of this latter kind are chiefly to be feared at crises of excitement: under ordinary circumstances, there is no serious danger of legal conflicts arising between legislators as such and private individuals, in which the impartiality of judges might be strained. The case is different with the executive. As we have seen, in order to maintain the laws it is necessary to invest the executive with rather extensive powers of interference with the liberty and property of private citizens: it is therefore important for the security of the latter that these powers should be exercised as far as possible under strict rules and limitations, and that the private individuals who suffer from their exercise should have the right of appealing as soon as possible to an independent and impartial law court against any transgression of these rules.[2] The chief constitutional regulations established with a view to this result are, indeed, commonly recognised as the most important protections of civil liberty; and this is perhaps the most convenient place to give a brief general account of them; since the most difficult questions as to the structure of the Judiciary are connected with its function of maintaining legal order against the guardians of that order themselves.

[1] See chap. xxvii. § 5.

[2] On the question whether the executive should have the right of suspending these rules in exceptional emergencies, see chap. xxii. § 10.

§ 3. First, we may note the need of rules reducing within the narrowest possible limits the power of the executive to imprison private citizens before trial. The most important provisions under this head are (*a*) that no one shall be arrested except on a definite charge of having committed a certain offence; (*b*) that the person arrested shall be brought as soon as possible before a judicial functionary who shall decide whether the charge is made on grounds *primâ facie* reasonable, and whether the offence charged is sufficiently grave to render it needful to keep the accused in confinement until the trial; (*c*) that if the charge is of this grave kind the accused shall be brought to trial as soon as possible, and that if it is of a lighter kind, he shall be set at liberty on bail. In order that these latter provisions may be effective, it is clearly desirable that the judicial functionary before whom the accused person is brought should be distinct from the executive and independent of its influence. This independence is further required to secure an impartial trial in any case in which the conduct of private persons which is alleged to be illegal is certainly inconvenient to the executive. It is also required to secure the effectiveness of another of the constitutional bulwarks of freedom to which I above referred, — the right of suing or prosecuting government officials for any illegalities committed by them in performance of their functions. For if the conduct of one member of the executive had to be judged by another, or by a judge practically under its control, the *esprit de corps* which may be presumed to exist in the executive as a body, and its natural tendency to resist any restriction on its powers, would diminish the complainant's chance of obtaining an impartial hearing and adequate redress.[1]

How, then, is the required independence to be secured? Let us first assume that the judges are to be professional experts;—since it can hardly be doubted that to obtain the knowledge and skill required for the consistent and accurate

[1] Whether cases of this kind should be tried by the ordinary tribunals will be considered later, § 8.

determination of legal rights and duties in particular cases, continual professional practice as well as systematic preparatory study are generally necessary in an advanced stage of civilisation, in most if not in all departments of the administration of law. We may further assume that these professional judges will be arranged in grades, so that the most important cases may be reserved for the ablest intellects; and especially the courts of appeal required to correct judicial errors may command confidence by their superior grasp and insight. It seems then clear, in the first place, that to secure the judicial independence of the judges in all grades they should be not simply dismissible—or appointed for short periods—by the executive. On the other hand, it is obviously undesirable to make the appointment and dismissal of judges a part of the regular business of a numerous elected legislature. Such a body can hardly be expected to estimate efficiently the special knowledge and skill required for judicial decisions, and is likely to be too much influenced by popular sentiment and party spirit;—especially under parliamentary government, where judicial independence is chiefly required for the protection of minorities, since the relation of the heads of the executive departments to the representative assembly would suffice to restrain the former from encroachments likely to be resented by the majority of the electorate. For similar reasons, direct popular election of judges is even more open to objection. On the whole, it seems best that judges in all grades should ordinarily hold office during good behaviour; and that the power of dismissal required to meet cases of misbehaviour or grave unfitness, should be normally exercised by a body of judges of the highest grade. The dismissal of any member of this body ought to be a very rare event: if the occasion for it should arise, any danger of undue indulgence on the part of this high tribunal towards one of its members might be met by constructing a special court, in which members of the legislature form a majority, with power to dismiss any member of the judiciary for adequate reasons. The control of a tribunal so con-

stituted seems necessary, in the last resort, to secure that the judges loyally apply the law laid down by the legislature.[1]

The appointment—as distinct from the dismissal—of judges of the lowest grade might be given to the executive, without any danger to judicial independence: but promotion by the executive from a lower grade to a higher may be as dangerous to independence as the power of dismissal, since it would be practically much easier for the executive to reward judicial subserviency by promotion than to punish its opposite by dismissal. On the other hand, it hardly seems desirable to give the function of appointing judges to one or more judges of the highest grade, since being normally irremovable they could not be made effectively responsible for bad appointments: while to prohibit promotion altogether within the judiciary would sometimes exclude the most competent persons from the higher posts. The problem does not seem to admit of a perfectly satisfactory solution: we can hardly avoid either some danger to judicial independence, or some risk of inferior appointments; hence, whatever solution is adopted, we shall have to trust to public opinion—especially the opinion of the legal profession—to minimise the consequent danger.

§ 4. So far we have confined our attention to professional judges. But since the administration of justice requires not only a knowledge of law but also knowledge and sound judgment of the particular facts of the case tried, it has been widely held that it tends to be improved by the introduction of what is called a "lay" element—*i.e.* of persons other than professional lawyers—into judicial tribunals. Actually, such a lay element in various forms has a large place in the judiciary of modern states: and as its introduction is partly advocated as a solution of the problem of securing judicial independence, we may conveniently now proceed to consider it.

[1] For reasons already explained (chap. xxiii. § 4), I do not think that either chamber of the Legislature would be well adapted for exercising judicial functions. The tribunal suggested in the text might also deal with certain charges brought against executive officials. See § 9 of this chapter.

The professional and lay elements may be associated in judicial work in four distinct ways:

(1.) Legal experts may decide all questions with lay advisers.

(2.) Lay judges may decide all questions with legal advisers.

(3.) Both elements may blend in one tribunal, of which all members have an equal voice in deciding all questions.

(4.) The whole judicial function may be divided into two parts, one allotted to the legal, and the other to the lay element.

The first arrangement seems appropriate to cases where the main difficulty lies in determining points of law, but special experience is occasionally required for the right application of the law to the facts. On the other hand, where the law to be applied is mostly clear and simple, so that difficulties arise chiefly in ascertaining facts and judging of motives and intentions, there are strong economical considerations in favour of the second plan: since the services of unprofessional judges, if the demand made on their time is not very heavy, may be often obtained gratuitously or for a comparatively small expense. Where there is no such preponderance of either kind of difficulty, the choice would seem to lie naturally between the third and the fourth method: and of these the latter seems *primâ facie* preferable, as it assigns to each part of the tribunal the sole responsibility for that part of the judicial function for which it is deemed to be best qualified. The division of work, again, may be either compulsory, or at the discretion of the judge or of the parties; and the two elements of the tribunal may do their work either (1) separately—as when a scientific investigation required for deciding a judicial issue is conducted by referees—or (2) in combination.

The arrangement last mentioned is that adopted in the ancient and still surviving organisation of the judicature in England,—to some extent in civil cases, and universally in criminal cases where the offence is grave. The law as

applicable to any case is determined by a judge possessing legal knowledge and skill, who also in criminal cases assigns the punishment within limits laid down by law, while the ascertainment of the facts of the particular case, and the final decision on the issues raised, devolve on a jury of twelve persons, commonly selected for each particular case from a list of the householders of the district possessing a certain property qualification—some special classes of persons being excluded.[1] The impartiality of the tribunal is supposed to be secured by the introduction of a sufficient element of chance into the selection, and by the right of the litigants[2] to challenge any person selected, for reasons assigned, and in important criminal cases to reject a certain number without reason. This institution is probably the most famous of the judicial bulwarks of liberty to which I before referred; and the question how far this, or any similar admission of a lay element, is expedient, in the judicature of such a society as we have been contemplating throughout, is perhaps the most important of all the questions that belong to this department of constitutional construction.

I do not think it a question on which a clear *general* decision can be reached, apart from a consideration of the

[1] It seems important to recognise expressly *three* parts of the judicial process, besides the assignment of the punishment—(1) the determination of the general rule, (2) the ascertainment of the facts in any particular case, and (3) the application of the law to the facts. It is necessary to distinguish this last from the other two, because, even where there could be no doubt or difficulty about it if the other two parts of the process have been properly executed, still, if we consider the process as divided between an actual judge and actual jury, possessing human defects and weaknesses, and liable to the ordinary human perversions of motive, we can see that it may make an important practical difference whether the application of the law to the facts should be left to the expert who declares the law, or to the twelve plain men who pronounce on the facts. And if the institution of the jury is valued rather as a protection against governmental encroachments on private rights, than as an instrument for performing in the most efficient manner the intellectual process involved in the judicial administration of law, there can be no doubt that the protection is more complete if the jury has not only to supply the minor premiss of the legal syllogism but also to pronounce the conclusion. Sometimes, too —as we shall see—the question of guilt falls as naturally within the province of the "plain man" as any question of pure fact.

[2] Including under this term prosecutor and defendant in criminal cases.

habits and sentiments prevailing in a particular country at a particular time; but it may be instructive briefly to examine the arguments for and against it, distinguishing different cases.

§ 5. Firstly, in many disputes of legal right, arising out of industrial and commercial relations, it is difficult to apply legal principles properly—however precise they may be in themselves—without special experience of the conditions and customs under which particular businesses are carried on: since such experience is required to judge rightly of the motives, intentions, and implied understandings of the persons concerned. In such cases a combination, in some form or other, of legal experts with men of business possessed of the special experience required, seems likely to furnish the best qualified tribunal. Further, there are cases in which the estimate of culpability involves more than merely knowledge of the rules of law and ascertainment of particular facts; it involves the application of a standard which can never be quite definite and can only attain adequate definiteness for practical purposes through experience of similar affairs;—as when the question is whether a man has taken "reasonable care" to avoid causing mischief in certain circumstances. Here again special experience of a particular business is sometimes required; sometimes, again, what is needed is rather a general experience of affairs which legal experts generally are as likely as other people to possess, but of which any one such expert might happen to be devoid. In the latter case the best security for justice seems to lie in a tolerably numerous tribunal: and as a numerous tribunal of legal experts would be costly,—and wasteful so far as legal knowledge and skill are concerned,—there is a strong economic argument for some such institution as the jury.

Some advocates, however, of the jury system go much further; they argue, broadly and generally, that for the ascertainment of truth on the questions of *fact* that come before a law court there is an intellectual superiority in the judgment of "plain common sense," as compared with conclusions reached by the "artificial and technical methods

of proof to which the legal mind is prone." Where, however, the right conclusion has to be drawn from a mass of more or less conflicting testimony of witnesses of all degrees of trustworthiness, supported by a web of inferences, often necessarily subtle and complex, from circumstances of all degrees of evidential relevancy and importance,—it would seem that in such processes the skill derived from special training and experience will be an advantage difficult to counterbalance. A competent judge will normally be, through practice, an expert in the performance of these processes, as well as in the more technical reasonings by which the legal rule applicable to any given case is determined: nor do I see any ground to suppose that his practice in the latter kind of inference will interfere with the empirical skill gained by his practice in the former. It may be replied that the judge can and does give the jury the full benefit of his skill in summing up the evidence before their final deliberation. This is, no doubt, the English practice, but it is a compromise hardly consistent with a full belief in the superiority of plain common sense; and it is therefore not surprising that in the United States the judges are generally "forbidden to charge a jury upon the facts of the case."[1] Nor does the compromise really obviate the objection just stated. For firstly, if the decision does not rest with the judge, it is probable that in the very cases in which, on account of their difficulty, the opinion of an expert would be of most value, the judge will be inclined to avoid the responsibility of drawing the balance between conflicting considerations, and will simply confine himself to his recognised duty of impartially stating these considerations. And secondly, even supposing the conclusion of the judge to be always plainly stated, it does not follow that the jury will adopt it; indeed, to prove this would prove too much, as it would show that the intervention of the jury was no less superfluous than harmless. In fact, it is notorious that English advocates continually address appeals to juries which would have no weight with experts, and that these

[1] See Bryce, *American Commonwealth*, Part II. chap. xxxviii.

appeals sometimes prevail against the clearly indicated opinion of the judge.

A somewhat different turn is sometimes given to the argument just discussed when used in special application to criminal justice. Thus Bluntschli[1] says that the "principle of the jury system"—in this application—is, that "no one shall suffer punishment for an offence unless his guilt has been made clear to the plain understanding and natural sense of justice of men taken from the people at large." This may either mean that the justice of the general rule applied, or that the cogency of the deduction by which it is applied, should be made generally intelligible. The latter demand should, I think, be satisfied as far as possible, though it may often be impossible to satisfy it fully; since, if the cogency of the judicial deduction cannot be made thus clear, the law is evidently wanting in "cognoscibility." But the former demand seems to be sometimes intended: and I certainly think that the power of the jury to give a "general verdict,"—*i.e.* to declare an accused person guilty or not guilty, instead of merely declaring whether he has or has not committed certain acts,—has been used in England to secure the satisfaction of this demand; the jury have more or less consciously applied not the actual law,—which they could hardly claim to know better than the judge—but what, in their opinion, the law ought to have been. Now it is no doubt to be wished that all penalties imposed by law should be, so far as possible, approved by the moral sentiments of the community. But where the legislature is adequately under the control of the citizens at large, an irregular rectification of law by a small casual selection of citizens is surely undesirable. If the law is to be nullified in any district in which it happens to be unpopular, it seems better that the right of nullification should be formally allowed to a local legislature than that it should be assumed by a jury. If, on the other hand, it is admitted to be necessary to repress by penal statutes conduct which some local majority—or even perhaps the common sense of persons who have not

[1] *Allgemeines Staatsrecht*, Bk. V. chap. iv.

fully considered the matter—does not regard as gravely blameworthy, it seems more conducive to the realisation of the legislature's designs that the application of such laws should be entrusted to professional judges, rather than to "plain men" whose "natural sentiment of justice" will irresistibly incline them to dangerous indulgence.

The case is different where legislation is not effectively under popular control; here the jury—or some similar introduction of the lay element into the judiciary—may be useful in keeping the development of law in harmony with the changing needs of the community. But in such a government as we are now considering, I cannot but conclude that the intellect of an average judge is generally to be preferred to that of an ordinary jury, as an instrument for attaining right conclusions on questions of fact. At the same time I have already admitted that there are certain cases where the intervention of a jury of persons specially experienced in the affairs with which the trial is concerned may be of real value.

Another argument often used in favour of the jury relates to the moral qualification necessary for the administration of justice. It lays stress on the greater chance of incorruptibility in a judicial organ improvised *ad hoc* in each trial by casual selection from the community at large, as contrasted with a permanent professional organ. But if jurymen are personally corruptible, it will be hardly possible to prevent them from being bribed, at any rate if the case is important and prolonged; and, on the other hand, the inducements to refrain from bribery can easily be made more effective in the case of the judge. Indeed, the experience of modern England seems to show that if judges are adequately paid, the fear of social disgrace and professional ruin is sufficient practically to exclude the danger of bribery in their case.

And, on the other side, if both judge and jurymen are not corruptible, it may be presumed that the former is more likely to be free from unconscious bias than the latter: as the performance of his daily duties will

tend to give him an exceptional habit of impartiality. Whereas jurymen will tend to be unduly influenced by popular dislikes and sympathies: and if they are mainly drawn from certain classes, they are likely in civil controversies to have a bias in favour of these classes as against others. It has been said,[1] that in England "no insurer resisting a life policy, no great company resisting a claim for an accident, no lawyer or doctor suing for his bill, no gentleman contesting a tradesman's charges, no landlord suing for a forfeiture, no informer suing for penalties, no person in any way generally unpopular, can depend on the impartiality of common juries:" and though the statement is, I hope, too sweeping, it can hardly be doubted that there is a considerable danger of partiality in the directions indicated.

So far I have been considering the institution of the jury as an instrument for obtaining right judicial decisions; but it may also be considered in another aspect—which may be called in a special sense political—*i.e.* in respect of its influence on the relations between the citizens and their government. From this point of view it must be admitted to have important advantages: but in a varying degree according to the subject matter of the judicial procedure in which it is used. In ordinary civil cases its main recommendation is that a wide diffusion of the experience of actually taking a part in governmental work of some kind has a valuable educative effect on the citizens: it tends to keep alive their political consciousness, and make them regard the business of government, not as a mystery beyond their comprehension and concern, but as their own public business, the management of which they ought to understand sufficiently to be able from time to time to take a part in it. But though this is an argument for giving *some* public functions if possible—besides the function of voting periodically for members of parliament—to some members of the class from which jurymen are drawn, it is not an argument for giving them *judicial* functions especially.

[1] Brown, *Dark Side of Trial by Jury*, 1859.

There is, however, a further argument in the case of criminal justice: viz. that the function of condemning to punishment — especially capital punishment — is liable to involve the functionary in more or less odium, which from time to time may reach an intense degree of unpopularity, if for any reason the sympathy of the people in general is enlisted on the side of the criminal. If, then, this odium is entirely borne by a professional judge, it may accumulate until it generates a dangerous amount of discontent against the administration of the law. Whereas if the responsibility of pronouncing the verdict is thrown on a court formed of a casual combination of private citizens, which is resolved again into its elements when the verdict is once given, their judgment is likely in the first instance to cause less discontent even when it jars on popular sympathies; and any discontent that it may cause is likely to be shortlived, and can hardly be a source of public danger.

There is a special kind of criminal trials in which the jury system has been regarded with approval even by thinkers who were fully alive to its defects as an instrument for the ordinary administration of justice: viz. trials for "political" offences,—*i.e.* for acts, whether otherwise criminal or not, of which the alleged design is to overthrow or weaken the authority of the existing government with a view to the forcible substitution of some other government. It is obviously of special importance for security of impartial justice that the court which decides these cases should be independent of the influence of the executive; and we have seen it to be difficult to secure this completely in the case of the legal expert to whom the function of declaring the law must be entrusted, without sacrificing the best mode of appointing such experts. It seems, however, doubtful whether there is a better chance of impartiality if the application of the law is left to a jury, in a community in which the executive is directly or indirectly under popular control: since, in such a community, party feeling is likely to run high, and it will be almost impossible

to find a jury that is not strongly biassed either for or against the government.[1]

To sum up: it seems to me that the weight of argument is on the whole against the use of a jury in civil trials:—except in certain cases, in which it should be composed of persons possessing some kind of special experience. As regards criminal trials of importance—especially for capital offences—the balance of argument seems to me at present the other way: but I think that if civilisation continues to progress, the arguments on the negative side will be ultimately found to be decidedly the stronger.

I may observe that the distinction above drawn between the use of the jury in civil, and its use in criminal, cases corresponds to the historical development of the institution: since the *civil* jury remains almost[2] peculiar to England and her colonies, while the *criminal* jury has spread from England to several other European countries.

For the requirement of *unanimity* in the verdict of a jury it is hard to find even plausible grounds in civil cases. It is commonly defended in criminal cases as a protection of innocence: and it is doubtless better that a guilty man should escape than that an innocent man should suffer unmerited punishment: but jurymen generally are likely to feel adequately the force of this argument for giving the accused the benefit of the doubt: there is no reason, therefore, to suppose that where a minority refuses to condemn it will more often than not be right in so refusing. To require more than a bare majority for condemnation is the utmost that seems defensible.

§ 6. We may now proceed to notice briefly certain other important differences in the machinery for realising *civil* and *criminal* justice respectively, corresponding to the difference of aims in the two cases. As we have seen,[3] in

[1] I observe that this view of the inevitable partiality of juries, in political trials, appears to be generally accepted by both political parties in England at the present crisis (1888-90), though its application by each party is different.

[2] It finds a place in the constitution of Portugal; and it has been introduced from England into Scotland; where, however, it is not so largely used as in England, and is not thought to work so well. [3] See chap. viii. p. 115.

civil actions the direct aim of the judicial intervention of government is to decide disputed points of private right, and give adequate remedies for private wrongs. If, therefore, any individual can obtain the satisfaction he requires otherwise than by the intervention of government, there is no need that the latter should take place: indeed, it is obviously better that the expense, trouble, and probable increase of ill feeling which a formal public trial is likely to entail, should be spared to both parties. Hence, it is desirable that government shall encourage suitors to resort to arbitration; and should enforce the decisions of an arbitrator, if he has been duly appointed and there is no ground for impeaching his *bona fides*, in case either party refuse to abide by the result of the arbitration. And when the intervention of the judge is necessary, his proper function is obviously to hear both sides and decide between them: no one has ever doubted that the manner of procedure in a civil action should be litigious and not inquisitorial, and that the judge should not initiate a civil action, or carry it on against the will of both parties, or decide any issues of right not raised by the parties.

In all these respects criminal or penal justice presents an important contrast. Punishments, as distinct from damages, are inflicted for the prevention of offences, and therefore primarily in the interest of the community: and where they are inflicted (as is the commonest case) for mischief that falls primarily on some private individual, it is important—at least unless the offence is slight—that the matter should not be settled by private compensation to the individual. This result may be partly attained by making it illegal to "compound a felony": but it seems inequitable that the burden of bringing the offenders to justice should be legally thrown on the person who has already suffered the mischief of the offence, or his nearest relatives: nor is it desirable to rely entirely on revenge—which is an objectionable motive—or safe to rely on public spirit for the performance of this important duty: while, again, it is not in most cases expedient that individuals should be tempted

to take up this invidious task as a trade, for the sake of a pecuniary reward.[1] Under these circumstances, the necessity for a public prosecutor or investigator of crime appears incontrovertible.

It is not so clear whether the prosecution or investigation of crime should be regarded as belonging to the executive or the judicial organ. As the business requires energy, discretion, and skill more markedly than judicial impartiality, it seems expedient that the officials engaged in it should be under conditions—in respect of dismissibility—similar to those of executive officials generally: also the work of discovering the perpetrators of crime and proving their guilt is naturally connected with the essentially executive business of forcibly preventing and repressing crime. Moreover, on the assumption that a criminal trial is to take a litigious form, and to be conducted as a dispute between the parties, any close official connection between prosecutors and judges is *primâ facie* objectionable as tending to throw suspicion on the perfect impartiality of the latter. On the other hand, if the prosecution of crime be made a part of executive business, there is some danger of its being performed with undue partiality towards members of the executive. To obviate this, it should be open to private persons to prosecute—judicial permission being obtained—if the public officials decline to do so, or even along with them: and the power—which seems necessary—of prohibiting prosecutions as vexatious should be vested in a judicial and not in an executive organ.

It may, however, be doubted whether the litigious form of procedure, which is proper to civil suits, ought to be adopted in a criminal trial. Certainly a public prosecutor, in presenting his case, ought not to show, and would be generally condemned for showing, the partiality which is

[1] There are only two cases in which the expedient of repressing mischievous acts by "penalties" recoverable by "common informers" appears to be admissible: (*a*) in the case of offences at once difficult to discover and important to repress, and yet not directly mischievous to private persons; and (*b*) as a constitutional security in the case of offences committed by public officials.

tolerated as natural and inevitable in a private litigant. Hence the litigious form of criminal procedure is open to the objection that the litigants cannot really be on equal terms: *e.g.* an advocate for the prosecutor would be severely blamed for concealing evidence telling in favour of the accused, but the accused or his advocate would not be similarly blamed for concealing evidence against him. Still, to secure justice, an unbiassed judge who has no responsibility for the prosecution seems indispensable, not only in the final trial, but also to decide whether there are adequate grounds for imprisoning the accused before trial: so far, therefore, the litigious form of procedure seems inevitable, and it is difficult to combine it satisfactorily with a procedure to any extent inquisitorial. At the same time, I admit that where an accused person has in any case to be kept in prison for some time before his trial, there is an obviously convenient opportunity for a private inquisitorial investigation by a judge: and that such an investigation is often likely to be a more effective instrument for finding out the truth than a merely litigious procedure. I think also that the English dislike of inquisitorial examination of accused persons is partly due to a confusion between the sound principle that an innocent person should be allowed every means of proving his innocence, and the unsound principle that a guilty person should be allowed to resist or evade attempts to prove him guilty.

I may note briefly the characteristics of criminal procedure—at least in grave cases—which seem to me to follow properly from the sound principle just mentioned. The accused person should be allowed complete information as to the charges against him, full time for preparing his defence, and the advice of experts. He should be allowed to hear all the evidence given against him and to cross-examine the witnesses personally or by counsel—to make the latter privilege completely effective, it seems desirable, generally speaking, that only oral evidence should be admitted;[1] unless the accused himself wishes to put forward

[1] *i.e.* in the final trial.

written testimony on his behalf. He should be allowed to summon witnesses on his side who should be bound to attend, and, if he wishes, to give evidence personally, subject to cross-examination. As a final guarantee against official oppression, his trial should be in a place to which the public are normally admitted; though exceptions to this rule of publicity are needful in special cases, in the interest of morality; and the judge should always have such powers of exclusion as may be necessary to maintain order, and repress demonstrations of popular feeling dangerous to the independence of the tribunal.

§ 7. A right of appeal against the decision of any court of first instance should generally be allowed, in order to correct mistakes and preserve uniformity in the judicial interpretation of law. It is a more difficult question how far an appeal should be allowed from a decision on a question of fact, which does not form a precedent. In particular, such an appeal does not harmonise well with the jury system; except in cases where there is fresh evidence, of which the absence in the first trial was not due to the negligence of the party whom it favours. For it hardly seems consistent with the principle of the jury system to appeal from a jury to a court of professional judges; while, if the appeal be made to a second jury, it is hard to see why this should be generally expected to judge more correctly than the first. It would seem therefore, that, in civil cases at least, a decision of a jury should not be set aside by a court of appeal because it is against the weight of evidence, except when an unmistakable and scandalous miscarriage of justice has occurred. In any case, the independence of the court that has the power of overruling the jury should be guarded with especial care: and, if the principle of the jury system is thoroughly maintained, the result of the overruling must be not a decision on the question at issue, but a new trial by another jury.

The question of appeal—on other than purely legal issues—in criminal trials is beset with peculiar difficulties, especially where the punishment is severe, and such as either could not, or practically would not, be increased on appeal:

since, in such cases, one would expect criminals always to appeal, unless prevented by cost: while if cost alone prevented the appeal, the inequality between rich and poor would be flagrant. A widely accepted way of meeting this difficulty is not to grant a formal right of appeal to convicted criminals, but to give to a high executive official the power of remitting or mitigating punishment at his discretion; a power which can also be used in cases where the infliction of the full legal punishment would be for special reasons impolitic, as well as in cases of judicial error. The objections to this are (1) that an executive individual or council is not likely to be particularly well qualified for difficult judicial functions, and (2) that the executive thus acquires a dangerous power of weakening the restraints of law. On these grounds it seems desirable that if this power be vested in the executive its exercise should be subject to the approval either of carefully selected judicial advisers or of parliament: judicial approval being required when the "pardon" or commutation of punishment is granted on strictly judicial grounds, parliamentary approval when it is granted on extrajudicial grounds. The latter kind of intervention should, however, be extremely rare, lest the deterrent effect of legal penalties be dangerously weakened; and the initiative should in no case be taken by parliament, so that the responsibility for the exceptional procedure may be concentrated on the executive.

Finally, the consideration of expense renders it expedient to deal with cases of minor importance in a more summary manner, with a procedure in which simplification for the sake of economy overrides to some extent precaution against error. The same consideration may reasonably prevent the separation of executive and judicial functions from being carried out to the extent that would otherwise be desirable.

§ 8. So far I have taken note of the differences of grade in the judiciary required on grounds of economy — tribunals of the lowest grade being confined to cases of minor importance;—and also of the differences in organisation corresponding to the fundamental distinction between civil and criminal

procedure. It remains to consider how far any further specialisation of judicial work and machinery is expedient. It is obvious that if a lay element, qualified by special experience, is introduced into the tribunals, they must be so far different for different departments of business: but it does not follow that the legal element, even of these tribunals, need be similarly restricted. The chief arguments for specialisation, here as in other matters, are that it renders possible a completer adaptation of the worker to his work, and tends to increase the skill derived from practice: on the other side, we have to take into account difficulties in defining the competence of different courts, and the waste of labour and expense entailed either by disputes about competence or by the necessity of breaking up a complicated dispute and dividing its naturally connected parts among different tribunals. In some cases, of course, the dividing lines are much easier to draw than in others: *e.g.* questions of divorce or of electoral right are easily separated from other matters of legal controversy, but it is difficult to find a definition of commercial transactions which will distinguish them in a clear and intelligible manner from other transactions. In any case it seems desirable, in order to maintain consistency in the administration of the law, that there should be one strong Supreme Court, with the power to correct errors committed by other tribunals in the general definition of civic rights and duties.[1]

A question of great importance that comes under this head is whether there should be special "administrative" courts[2] for disputes of right between governmental officials and private persons. For some disputes of this class there certainly seems to be no need of special judicial machinery: *e.g.* disputes as to pecuniary claims in respect of taxes or otherwise, made on private individuals in behalf of the public, or similar claims made by individuals on the state, in consequence of contracts between them and the government.

[1] Such a court need not necessarily have the power of deciding cases on appeal: it may have only the power of cancelling decisions arrived at by a process involving a material error in law.

[2] *Tribunaux Administratifs.*

There is no reason for withdrawing the decision of such questions from the tribunals that deal with the mutual pecuniary obligations of private persons.[1] The case is different when damages are claimed or punishment demanded for illegal violations of private rights by executive officials. Where, indeed, the alleged offences are committed by officials either avowedly not acting as such, or palpably misusing their official position for illegitimate private purposes, it again seems clear that it may be left to the ordinary tribunals to punish them, and to exact adequate reparation for the mischief caused by them. It is only where a wrong is alleged to have been committed by an official *bonâ fide* discharging his official duties, that the expediency of referring the question to the ordinary courts becomes doubtful.

In admitting this doubt, I do not lay stress on the danger —which seriously alarms some foreign publicists—of the conflicts of authority between the executive and the judiciary that must be expected to result from giving to the latter the function of sitting in judgment on the former. Such conflicts are doubtless to be regretted: but if the executive is to be kept effectively within legal limits—which has seemed indispensable—it must meet with the resistance of some independent body when it transgresses these limits: and the evils of conflict are likely to be minimised if the independent resisting body has simply the judicial function of interpreting law, and no call or excuse to interfere with the exercise of the discretion that the law has assigned to the executive. Any impulses on the part of the judiciary to usurp a control over the discretion of the executive will ordinarily be easy to check by further legislative definition of that discretion: in the last resort, the power of dismissing judges, that I have proposed to reserve to a body in which members of the legislature form the majority, would suffice to overcome any obstinate attempts at usurpation.

[1] It does not follow that the public should have no special advantages in such litigation, to balance the force of self-interest that must be expected continually to prompt private encroachments on public rights. But these advantages should be carefully defined by law, not secured by any partiality in the tribunals that apply the law.

My fear is rather that a tribunal not specialised by containing as one element persons who have had experience of executive work will hardly be well qualified to interpret the limiting rules of law wherever a somewhat indefinite standard has to be applied. For instance, if the question is whether an official had reasonable cause for arresting a suspected criminal without a warrant, detaining a ship as unseaworthy, or breaking up a public meeting, it seems more likely that a just decision will be arrived at by a court including persons who have had official experience of somewhat similar matters: though to secure the independence and impartiality of the court, it is important that such persons should not be actually members of the executive at the time. There is, however, a considerable difficulty in constructing a tribunal of this kind that will command general confidence, and not be widely suspected of undue bias in favour of the executive. If this difficulty be found insuperable, it may be necessary, for the effective performance of governmental work, to give the executive somewhat wider legal powers than it ordinarily requires; trusting to public opinion and parliamentary criticism to keep its exercise of these powers within somewhat narrower limits than those enforced by the judiciary.[1]

§ 9. A cognate question is raised by the need of a tribunal for dealing with charges of official misconduct, of which the mischief falls on the public, and does not give rise to a private claim for damages. Where the alleged offender holds his post "during pleasure" of a superior, and the offence charged is such as will be sufficiently punished by dismissal from employment, or some lighter disciplinary penalty which the ordinary official superior can inflict, the need of a formal judicial procedure does not arise; but if the offender's tenure is on "good behaviour," or if the gravity of the offence calls for a severer penalty

[1] It should be observed that a right to receive services from executive officials does not necessarily imply a right to bring actions against such officials when the services in question are imperfectly rendered or improperly withheld. In the case of some governmental services—*e.g.* the relief of indigence—it would be palpably inexpedient to grant this latter right.

than dismissal, some judicial process is obviously required; the only question is whether it should be conducted by an ordinary court, or a special one, composed in whole or in part of experienced officials. The necessity of special military tribunals to punish breaches of military discipline is universally recognised; here, however, there is a peculiarly intense need of strict subordination and prompt punishment, and a frequent impossibility of having recourse, at least without intolerable delay, to external tribunals; reasons which do not ordinarily apply in the case of the civil service. In the latter case the question seems more doubtful; and the answer to it seems to depend on the degree of precision with which the official misconduct requiring punishment can be defined. Certainly the mere requirement of special penalties for breaches of official duty does not in itself involve a requirement of specially constituted tribunals; ordinary judges might be trusted to administer such penalties, and to understand that faults of omission and commission which are venial in private persons—*e.g.* breach of confidential secrecy—become grave offences in the case of officials. The question rather is, whether either the forms of misbehaviour justifying dismissal from the service, or the kinds of gross neglect or corrupt misuse of official power or other flagrant postponement of public to private interests, for which severer penalties seem to be necessary, are in fact so "various in their character and so indefinable in their actual involutions that,"—though "easily understood by statesmen"—it "is almost impossible to provide systematically for them by positive law."[1] So far as this is clearly the case, it would certainly seem that justice and the public interest require that such offences should be referred to a specially constituted tribunal, adequately supplied with the requisite experience of executive as well as judicial work. At the same time, a liability to punishment beyond dismissal, for offences that elude legal definition, is so formidable a risk to attach to the service of government—and so open to abuse in party conflicts—that

[1] Story, *Constitution of the United States*, Book III. ch. x. § 762.

I should hesitate to admit the need of it, without more proof than I have yet seen adduced.

The case is different with dismissal—even if accompanied with permanent exclusion from the public service:—since the official on whom this penalty may be inflicted by a judicial process, but not otherwise, has at any rate a securer tenure than most employees in private businesses. And for this purpose—so far as subordinate officials are concerned—it would not seem difficult to construct a suitable tribunal, of the kind above indicated. But the phrases I have above quoted are applied by Story to the more highly placed functionaries, for whom the process of impeachment before the senate is mainly provided in the constitution of the United States; and certainly the danger of official misconduct, at once grave and difficult to define with precision beforehand, seems to increase with the extent of the power placed in the hands of a functionary. At the same time the difficulty of finding a tribunal at once of adequate strength and impartiality, and adequate insight, seems to increase in equal or even greater ratio: while if judicial forms came to be used without judicial impartiality, as a method of party warfare, the remedy might prove worse than the disease. Further, it is not clear that such a tribunal is needed under Parliamentary Government for the repression of offences of this kind that may be committed by the heads of executive departments, since these functionaries will be practically dismissible by Parliament supported by the people; and the loss of reputation that would be caused by such misconduct as would justify condemnation by a tribunal, would most probably lead to the retirement of the offending functionary. The case is however different where the supreme executive is appointed for a fixed period and is not dependent for its tenure of office on a parliamentary majority; in this latter case it would seem that the need of some process for getting rid of high officials guilty of grave misconduct may be occasionally very urgent, so that the advantages of establishing a tribunal before which they may be impeached outweigh the disadvantages.

Supposing that it is decided to establish such a tribunal, it might properly be made identical with that before proposed for the ultimate control of the judiciary. It should accordingly consist of a small number of persons, partly judges of the highest grade and partly members of one or both legislative chambers, elected by their respective chambers in some way that would secure a proportional representation of different sections. I say "one or both" chambers, because I think that the function might with advantage be given to the Senate alone—as being more likely to contain and elect statesmen of ripe experience and judicial temper—provided that the Senate is so elected as to possess adequate representative weight. In any case the element contributed by the legislature—which should form the majority in the tribunal—might be expected to bring experience of political business, and to counteract any tendency on the part of the judges to apply too technical methods to the case; while it might be hoped that the judicial element would prevent the matter from being decided by a mere party vote.

# CHAPTER XXV

## LOCAL AND SECTIONAL GOVERNMENT

§ 1. EVEN in the larger modern states, if of the unitary type, the greater part of the supreme decisions in the work of government are normally made in a city selected as a political centre. It is here that the supreme legislature usually meets, and the courts that finally decide doubtful points in the interpretation of the law; and the superior officials in most executive departments ordinarily transact business here. Still, as we have seen, to prevent excessive cost or delay in the administration of justice an adequate provision of local tribunals is required. Similarly, most internal executive functions, whether coercive or industrial, obviously need officials locally dispersed,—policemen and soldiers for the maintenance of order, collectors of taxes direct and indirect, managers of roads and public land of all kinds, postmasters and other officials occupied in conveyance and communication, relieving officers, sanitary inspectors, and so forth. In speaking, however, of "local governments" in a unitary state, we chiefly mean organs which, though completely subordinate to the central legislature, are independent of the central executive in appointment and, to some extent, in their decisions,[1] and exercise a partially independent control over certain parts of public finance; and in the present chapter I shall confine my attention mainly to such partially independent organs.

The primary reason for this local independence is, that

[1] Chiefly, as we shall see, in their executive or administrative decisions.

it is required to realise the full advantages of that reaction of the governed on the governing organs which representative or responsible government seeks to bring about. Such advantages may lie in the direction either of greater efficiency or of greater economy. The accepted *rationale* of responsible government rests on the principle that the interests of any group of governed persons are likely to be best looked after by governing persons whom they have the power from time to time to dismiss, directly or indirectly. It is an obvious inference from this principle that governmental functions which affect solely or mainly the inhabitants of a limited portion of a state should be placed under the special control of this section of the community; in order that the criticism of this section, backed by the power of appointment and dismissal, may bring about a closer adaptation of administrative activity to its peculiar needs. Especially in matters—such as education and poor-relief—in which valuable aid can and should be given to governmental work by the voluntary efforts of private persons, we may expect to secure important gains by localising the control of the electorate over the work. Again, so far as any governmental services are properly regarded as rendered exclusively or mainly to a group of persons who live within a certain district, the whole or main expense of these services may be equitably thrown on these persons; and—so far as this expense cannot conveniently be met by payments voluntarily made by the recipients of the services,—the comparison of cost with utility is likely to be more accurately performed if the financial management of this department of governmental business is entrusted to a separate locally-elected organ.

But there are other reasons why a vigorous development of local government is important, if not indispensable, to the effective working of representative institutions in a community as large as most modern states are. Over-centralisation, in such a community, introduces two opposite dangers. In the first place, if the only action that an ordinary citizen is called upon to take, in reference to public affairs of any great

interest or importance, is that of voting at intervals of several years, as a unit in a group of many thousand electors, for a member of the central legislature,—or even for the head of the executive,—there is a danger that the control of the citizens generally over their government will become slack and ineffective; so that their exercise of the vote will be especially liable to be perverted by the sinister influences which we have before examined. But again, the same cause that tends to render the political consciousness of the ordinary citizen too languid at ordinary times also tends to increase the risk from occasional gusts of discontent and excitement, causing unreasonable expectations and complaints of government; since the mass of the community cannot but lack that general diffused knowledge of the real nature of governmental business, and the conditions and limitations under which it is carried on, which results from being brought into intimate social relations with the persons actually responsible for it. In short, whatever "educative" value is rightly attributed to representative government largely depends on the development of local institutions.

We must also take into account the danger of overloading the central government with work. The importance of this danger grows in proportion as a more extended view is taken of the proper function of government; if the tendency actually operative in England towards increasingly extensive and complex governmental interference is in the main justifiable—as we have seen reason to think—it becomes increasingly important that the work to be done should be carefully distributed among different organs, so that none may be overburdened.

On the other side, we have to reckon the economic and other advantages of having similar matters everywhere managed on a single uniform plan. We have also to consider the probability that both the central government and its critics—as compared with local governments and critics—will have the superior enlightenment derived from greater general knowledge, wider experience, and more highly-trained intellects; and we have to consider the greater danger in a

small locality that the sinister influence of a powerful individual, or corporation, or combination of persons with similar interests, may predominate to the detriment of the public. The force of these considerations will naturally vary with different circumstances, such as the condition of the arts of industry, the size of the local areas to which separate organs of government are allotted, the ease or difficulty of communication between different parts of the territory of the State. Moreover, the practical conclusion to which these considerations point may often be not centralisation pure and simple, but a combination of local and central organs—or of organs representing smaller and larger areas respectively—in the same department of governmental work: the organ representing the smaller area having the management of details, while the determination of principles and general supervision are left to the government of the larger area.

This division of labour, however, is often difficult to arrange; and the difficulty is increased when the question arises of using the organs of local government, as subordinate organs of the central executive, for the performance of functions which are of national rather than sectional interest—such as the enforcement of obedience to laws passed by the central legislature. On the one hand, it may be obviously inconvenient and uneconomical to divide the local business of government between two sets of organs, the one independent of the central executive and the other strictly subordinate to it; while yet, if this is not done, the independence of the locally-appointed organs is liable to interfere with the harmonious performance of executive functions.

Finally, we have to note that the allotment of any considerable independent powers to local organs of government is—like any other division of authority—liable to be a source of danger at crises: since local disaffection may find in these organs a ready-made machinery for organising resistance to the central government.

§ 2. It is by balancing the different considerations above given that the separation of governmental functions into central and local, and the local limits of the localised independent

functions, are to be determined; so far as they can be determined apart from the special historical conditions of the particular state, on the assumption that the community in question is tolerably homogeneous and adequately united by common national sentiments.[1] Actually, in determining the divisions and subdivisions of districts, historical conditions will rightly be allowed great influence; on account of the importance of respecting as far as possible traditional sentiments of community and habits of co-operation—especially in states formed by the union of previously independent or semi-independent communities. Apart from historical associations, convenient local divisions are sometimes decisively indicated by physical boundaries—such as the intervention of seas or mountain ranges—or by marked differences in the density of the population, exemplified by the current distinction between city and country. The close-packed inhabitants of a city have special need of more elaborate provision for water, light, drainage, and of fuller precautions against mutual mischief of various kinds; they have an almost exclusive interest in the paving and lighting of the streets and bridges of the city; and they have no direct interest in any regulations required for agricultural industries. It is therefore convenient to take cities as separate districts for many purposes of local government; though the lines of separation must often be rather arbitrary, as industries other than agriculture extend beyond urban limits, and variations in the density of population are gradual. Indeed, the determination of districts for local government must almost always be an imperfect compromise. The arrangement most suitable for some purposes can hardly fail to be less suitable for others; at the same time, the complexity arising from a combination of several different plans of division can hardly fail to be inconvenient. Further, the division abstractly most convenient is likely to vary continually with changes in the density of population, changes in the means of communication,—*e.g.* it has

[1] The effects of heterogeneity due to historical causes will be further considered in the following chapter.

been greatly altered by the introduction of railways—and other changes in the arts of industry, rendering scientific knowledge and systematic management more important than before in one or other branch of governmental action.

As regards the size of governmental areas, it may be noted that the smaller any such area is, the greater will generally be the *educative* effect of the control of its inhabitants over their government;[1] especially if the divisions are naturally so that an effective *esprit de corps* tends to exist within each group of persons thus divided off. At the same time, the more important the work that is assigned to the independent activity of local authorities, the more necessary it is that the area should be large enough to furnish an adequate supply of persons competent to direct and criticise this activity: also, districts should be sufficiently large to bear any ordinary burden of varying expenditure without excessive strain. Moreover, by increasing the area we diminish the danger of the predominance of the sinister interests of any one individual or class; thus a rural district that has important independent powers should be, if possible, large enough not to present the dilemma of either giving overwhelming influence to a single large landowner, or rendering him a too easy victim of democratic oppression.

The division of governmental functions will partly depend on the division of areas,—as it will properly vary with the size of the district. Apart from this consideration, we may say generally that the matters assigned to independent local organs should be those in which local separation of interests is most clearly marked, local knowledge most important, the need of uniformity and system least evident, and the co-operation of private and governmental agencies likely to tell most, —care being at the same time taken to avoid any formidable danger of local class-injustice. Where the interests concerned are clearly common to all parts of the state—as is mostly the case in the management of foreign relations—or

[1] One point of importance in the determination of local areas is the question of the desirability of *direct* government by the aggregate of citizens. This will be more appropriately considered in chap. xxvii.

where the advantages of system and uniformity are overwhelming—as in military matters, postal communication, provision or regulation of currency—the control over the administration should clearly be national and not local. On the other hand, where the interests affected by governmental action have definite local limits, there is a *primâ facie* reason for a partially independent organ of local government; but this reason may be outweighed by others, and even where it is decisive its application is not always clear; since, as the separation of local interests is rarely complete, and is very various in degree, a carefully adjusted co-operation of local and central organs is often required to attain the best results.

§ 3. It will be well to give one or two illustrations of the complex and varying considerations that have to be taken into account in determining the division of functions. To begin, the expense of paving and lighting the streets of a town should be thrown on those who reside in it, and the management of the business correspondingly localised; for though the resulting advantages will be partly shared by travellers and persons who make a temporary sojourn in the town, this will only be the case to a minor extent, and its effect seems fairly compensated by the contributions which such persons will indirectly make to the material prosperity of the town by their purchases from innkeepers, shopkeepers, etc. But the case of a highway between two towns, A and B, is less clear; for though it is likely to be more used by the inhabitants of these towns than other persons, it may be also in regular use as a part of the instrument of transit connecting remoter places. Hence, if the plan of defraying the expense by levying tolls on the carriages that use the road is abandoned as uneconomical, owing to the expense and loss of time involved in collecting the tolls, the only equitable measure is to divide the expense and management of roads between the larger and the smaller districts. Similarly, the management of natural resources—forests, natural waterflow, unappropriated land in general—is usually of special interest to parts of the community; at the same time, the general interest of the

whole community in their good administration is usually too strong to render it safe to abandon these matters entirely to local control.

The incompleteness of the separation of interests which we are considering assumes a different aspect in the case of the sanitary intervention of government—one of the most important functions of local authorities in the present stage of science and civilisation. The sanitary state of any district is a matter of serious concern to its neighbours, owing to the tendency of many diseases to spread; but the prevention of this diffused mischief may fairly be deemed to be not a positive service for which other districts ought to pay, but rather a part of the general negative duty of non-interference, which each individual and group of individuals acting corporately owes to all other individuals and groups. Hence the expense of such provision as should be made out of public funds for sanitary purposes may reasonably be thrown on the district primarily benefited by it; and, while its management in ordinary cases should be correspondingly localised, it still seems desirable that the central government should exercise a supervision over the local authorities, and have the power, in case of their default, to intervene and do the required work. Further, where the diffusion of disease—among human beings or useful animals—is likely to be rapid and dangerous, so that promptness and uniformity are specially necessary, the central government should have the power of intervening, without giving time for the local authorities to neglect their duty. For similar reasons, it seems expedient that central and local governments should have concurrent powers of taking measures for the extermination of noxious plants and insects. On the other hand, the prevention of mischief from fire may ordinarily be left altogether to the local organs.

The grounds for co-operation between organs of government representing respectively larger and smaller areas may be illustrated by the important matter of poor-relief. I have already mentioned poor-relief as a case in which the efficiency of the action of government may be materially

assisted by the voluntary activity of private citizens; which is more likely to be stimulated if the responsibility for the operations of government be localised, so that the concern for their efficiency may be intensified in each district. From this point of view, we may contrast the case of ordinary poor-relief with that of provision for the care and support of lunatics. The enlightened concern of private persons for the less fortunate members of society may do much to reduce the number of paupers, but it can do little or nothing to reduce the number of lunatics; hence, if the expense of supporting paupers is localised, an advantageous encouragement and reward is given to such private efforts by the diminution in the burden of local taxation which it tends to bring about; but there seems to be no similar gain in localising the expense and management of lunatic asylums. Also, the knowledge of the circumstances of the applicants for poor-relief, indispensable to its judicious administration, is more likely to be secured if it is administered by local authorities. On the other hand, it is desirable that the treatment of pauperism should be systematic and uniform within any country of which the parts are effectually connected by the modern machinery for conveyance and communication; and if in any such country the whole expense of poor relief is thrown on local taxation, it seems difficult to secure the inhabitants of any one district from bearing the burden of pauperism that they are not responsible for causing, without a mischievous interference with the free movement of labour from one district to another. It seems therefore at once equitable that the cost of poor-relief should be divided between local and national funds, and expedient that the management should be similarly shared.

The division of functions between central and local executives is a peculiarly delicate matter in the case of the management of the police. On the one hand, the persons residing in a town or other district have obviously a special interest in the repression and detection of crime within their district; and to entrust this function to local authori-

ties is useful in keeping alive in the minds of the citizens at large the sense that the prevention of crime is a public duty which ought not to be entirely resigned into the hands of officials; since circumstances may at any time arise in which the aid of private citizens in performing this function is valuable and even indispensable. On the other hand, it is of great importance to the whole community that no part shall be allowed to harbour law-breakers; and, assuming that the rules of law are in the main determined by a central legislature, it seems almost indispensable that the coercive organisation for their enforcement should be under the ultimate control of the central executive; since, if it is placed in the hands of locally appointed organs of government, there is a serious danger that laws locally unpopular will not be effectively enforced. At the same time local legislation should on the same principle be enforced by local police; and the existence side by side of two police organisations separately directed is likely to be a troublesome complexity. It seems, therefore, on the whole best that the main part of the police force should be supported from national funds and in the service of the central government, but that, together with any additional police locally appointed and paid, it should be normally left under the control of local executives, who should for this purpose act as subordinates of the central executive; it being always in the power of the latter to resume the control of the force paid by it, in case of necessity.

In the case of the machinery for the *punishment* of crime, the considerations in favour of a central organisation for any area over which a common system of law is established seem more decisive. The impulses of indignation that occasionally prompt private persons to take the punishment of crime into their own hands, call, in a normal state of society, for repression rather than encouragement; while the importance of uniformity in order to avoid injustice is very manifest. The task of justly apportioning punishment to crime is in any case a profoundly difficult one; but a needless and preventible kind of arbitrary inequality is introduced

into the application of punishments, if—*e.g.*—a period of imprisonment, nominally the same, involves very different degrees of privation and discomfort in different localities.

§ 4. So far I have chiefly had in view the executive or administrative work of government, together with the financial business which this entails. But perhaps the most important question that belongs to the present chapter —and one of the most important questions in the whole discussion of the structure of government—relates to the extent to which Legislation should be allowed to be localised. We have seen before that some power of laying down general rules, to be obeyed by others besides the servants of government, cannot without inconvenience be denied to the central executive: and in the same way the local executive work that we have been considering will naturally involve some exercise of legislative functions. Thus we may assume that local governments will have a limited [1] power of making general regulations for the common use of streets, bridges, parks, and other public property, of which the use is necessarily confined in the main to the inhabitants of certain localities, and of which, therefore, as we have already seen, the expense may properly be localised. So again the sanitary intervention of government and protective measures against noxious plants and insects, and against destructive floods, will usually involve a certain amount of general coercive regulation. But the peculiar interest that a man's neighbours have in his right behaviour is obviously not restricted to his observance of such rules as these. Even as regards the fundamental rights of personal security, property, and contract, it is indefinitely more important to a Yorkshireman that they should be properly defined and protected in Yorkshire, than that they should be properly defined and protected in Kent. Nay, further, it is to be expected that differences of physical conditions and industrial development—if not of race and political history —will render the special needs of Yorkshiremen in respect of protection from mutual mischief, enforced co-operation for

[1] If the power were unlimited it might be abused for the oppression of classes locally unpopular.

common benefit, or regulated use of natural resources, somewhat different from the special needs of Kentishmen; thus Yorkshire may require factory acts, but be indifferent to the regulation of hop-picking, or compulsory insurance against fruit disease, which may be prominent objects of concern in Kent. Hence localised legislation will tend to be more fully and closely adapted to these varying requirements than centralised legislation is likely to be. Even where the real requirements do not materially vary, it is not unlikely that there may be wide differences between the views prevalent in different localities as to the nature and limits of desirable legislative interference; and if this is the case, the gratification of the consequently divergent demands—even at the cost of some amount of bad legislation—may avoid the grave evil of spreading a general aversion to law in any district when the wishes of the inhabitants are over-ruled in deference to the opinions prevailing in other districts. It is true that the total amount of coercion involved in the enforcement of law does not *necessarily* tend to be reduced by extending the legislative power of local governments, even if such extension results in considerable local variations in law; since the aggregate of local minorities opposed to the different local laws may be as large as the previous minority opposed to the law of the state. But so far as there are any causes tending to make different opinions prevail in different districts, we may assume that legislation will be more closely adapted to the wishes of the inhabitants of all the districts taken together, in proportion as it is localised.[1]

On the other hand, we may assume that, speaking generally, the average statesmanship of the aggregate of local legislators will be inferior to that of the members of a single central legislature; and further, that the danger of mischievous legislation in the interests of a predominant class will be on the whole greater in the bodies responsible to sections

[1] Also, assuming that there is less aversion to migration within a country than to emigration from it, a quiet reduction of dissidence through the departure of the dissidents will be more probable in the case of local laws.

of the community. But the strongest reasons for limiting narrowly the legislative powers of local governments are drawn from the bad effects of diversity in the laws enforced in different parts of a coherent civilised community. In certain important cases, the protection from mischief which the law is designed to afford cannot be effectively given except by rules enforced throughout the whole country; thus, if Yorkshire refused to protect industrial inventions from imitation, any encouragement to inventors given by patent-laws in Lancashire would become practically worthless. But even in cases where uniformity is less indispensable, serious inconveniences must be expected to result from allowing the definitions of important legal rights to vary from district to district, within a country where migration from one district to another is unfettered and frequent. In the first place, such variations are likely to bring the doubtful equity and expediency of the varying laws prominently before the minds of ordinary citizens; so that it will become more difficult to maintain in due strength the habit of obedience to law and the sentiments condemnatory of illegal conduct. Further, the intellectual labour necessary to acquire adequate knowledge of the law for practical purposes will be seriously increased,—at any rate for traders and other persons whose callings bring them frequently into legal relations with inhabitants of different districts: And finally, since the law courts of any one district will be continually called upon to recognise the validity of legal relations determined by the laws of other districts, the judicial administration of law must become more laborious, through the bewildering variety of legal rules which judges and legal practitioners are required to know and apply; and the same cause will have an unfavourable effect on the average quality of judicial decisions.

These disadvantages make it generally expedient to avoid any extensive devolution of legislative powers on local governments, at any rate in a community of which the parts are not strongly divided by marked differences of race or civilisation, or the habits and sentiments surviving from

previous political independence, and are not precluded by distance or physical obstacles from active mutual communication. It should, however, be noted that the disadvantages above mentioned are likely to be very different in degree in different departments of law. Thus, we have before seen[1] that local variations are especially to be deprecated in the law regulating family relations, on account of the special importance in this department of harmony between legal rules and moral sentiments; and also in the law regulating commercial relations, on account of the natural and desirable tendency of such relations to extend over the lines of local division in a modern civilised community. On the other hand, we may expect the disadvantages of mere variation—apart from any consideration of the goodness or badness of the different rules—to be decidedly less in the case of laws regulating the tenure of agricultural land: since the purchase or occupation of such land is an important act that is not likely to occur very frequently in the life of an ordinary member of the community; and the disputes arising out of it will rarely involve any conflict of laws.

One argument for allotting legislative functions to local organs deserves special notice from a student of politics, since it interests him—if I may so say—professionally; viz. that it would assist the progress of political science, through the greater opportunities that it would give for the trial of legislative experiments. And certainly in matters on which the opinions of experts appear to be evenly divided as to the expediency of a given legislative measure, valuable instruction might often be gained by allowing it to be partially introduced by way of experiment in a district favour-

[1] See chap. xiv. § 5: where I have quoted from an American writer (Professor Munro Smith) an illustration of the bad effects of local variations in family law. It is, however, to be noted that the inconveniences due to local variations in law have been much reduced in the United States by the fact that most of the States have inherited the English common law, and both Federal and State Courts, in interpreting and applying this law, have co-operated to keep it practically the same in the different States. See Professor Munro Smith's Article (II) on *State Statute and Common Law*, in the *Political Science Quarterly* for March 1888.

ably disposed to it. I think, however, that this consideration would not usually lead to a complete devolution of legislative functions upon local organs, as regards the matter in question; but rather to a careful division of the legislative function between local and central organs: since the central organ, from its presumably greater skill and wider range of experience, is likely to be best adapted to ascertain and turn to account the scientific results of the experiment.

§ 5. In determining the structure of local governments, the general principles which have been laid down for the organisation of the central government are applicable, but with important differences, corresponding to the differences in the nature and extent of the functions assigned to the local organs. In the first place, assuming that legislation is mainly centralised, we may omit the judiciary from our present consideration; since, though it is fundamentally important that there should be an adequate supply of local tribunals, it is not desirable that they should be under local control. Secondly, assuming that the control of local as of national finance is given to a representative body, as this local parliament will only have legislative functions to a very limited extent, it will have leisure to undertake a larger share of the work of administration than it has seemed expedient to allot to the central parliament. The objections to the direct intervention of such a body in executive business apply less in the case of local government; as secrecy, vigour, and promptitude are less important in the matters of internal administration placed under local control, while the aggregate of special knowledge which a tolerably numerous representative body may be expected to possess is likely to be peculiarly valuable in such matters. On the other hand, the advantage of concentrating responsibility on an individual, instead of dispersing it among the members of a numerous council, is no less important in local than in national administration: it is even likely to be relatively greater, in proportion as the criticism of local administration tends to be less vigilant and vigorous than the criticism of national administration. Another point to

be noted is that the unpaid work of persons of leisure has naturally a larger place in local executive business, as the demands that this usually makes on the time and energies of the persons managing it are less heavy and incessant.

It seems generally expedient that the different functions of local government exercised over the same areas should be united—at least so far as legislation and ultimate control are concerned—in the hands of a single deliberative assembly or sub-parliament; in order that the importance of the aggregate of business thus formed may help to draw to the work the best talent available, of men who have sufficient leisure. The expediency of this is, however, conditional on there being a sufficient supply of competent persons available who have the amount of leisure required for the proper performance of this accumulated work, and are willing to give it to the public service. Where this is not the case the work may be better performed if it is distributed in smaller fractions: supposing that there are in the locality only a few persons able or willing to give *much* time to the work of local government, while there are a good many who can and will give a little.

§ 6. In some cases another reason for distributing governmental functions among different bodies in the same district is supplied by the consideration that is the primary ground for establishing local organs of government:—the principle that those who profit by any governmental expenditure should at the same time bear the burden of it, and exercise financial control over it. For within any district the utility of some expenditure, for which governmental intervention appears to be requisite, may accrue mainly to a section of the community. So far, then, as the inequality of benefit is definite and unmistakable, it is *primâ facie* reasonable that there should be a corresponding inequality in the allotment both of the burden of expenditure and of the power of control: but the extent to which this can be arranged, and the manner of arranging it, will probably differ in different cases. (1) If the work in question tends to promote, primarily and directly, the interests only of one special clearly defined

class—benefiting other classes only vaguely and indirectly, in the way in which most economic advantages tend to be diffused—it seems generally expedient to leave the control of the work entirely to the persons primarily interested; only giving them power to act as a body in spite of the resistance of a minority.[1] Thus, power may be given to a sufficient majority of the owners and occupiers of land in a district — or a sufficient preponderance of opinion, taking wealth as well as numbers into account — to undertake necessary works of drainage or irrigation, imposing on all the persons interested a share of the expense proportionate to their respective interests; the method of apportionment being determined by some impartial authority,—probably the central legislature. (2) If the advantage to be derived from the work by the inhabitants of the district generally appears palpable and considerable, though the advantage accruing to a special class predominates, a pecuniary subvention might be granted on certain conditions from funds raised by local taxation, the ordinary management of the work being still left in the hands of an association of the persons specially interested: provided that there is no material divergence between the common interest and the interest of the special class in question. (3) Where, on the other hand, the general interest is preponderant, though special benefits accrue to a small minority, it would usually be impracticable to allot to the latter any special share in the financial control of the work. Under these circumstances, though special taxation of the persons specially benefited still seems theoretically just, it will be liable to become practically oppressive unless the rules under which it is imposed are strictly determined by an impartial authority.

The discussion of what is properly "local" government has thus led us to consider a case of what, in the title of this chapter, I have ventured to describe as "sec-

[1] I assume that the coercive action of government is necessary to secure a satisfactory result, on the general principle on which this kind of interference has before been justified in exceptional cases. See chap. x. § 2, pp. 143, 144.

tional" government. I use this latter term to denote the cases in which governmental functions are exercised —by bodies (or individuals) partially independent of the ordinary executive—over portions of the community defined not by local habitation but by some other characteristic. It is quite conceivable that subordinate governmental functions should be largely distributed on this plan. A civilised community is naturally divisible, otherwise than locally, into classes that have to some extent common class-interests; and it seems at first sight a plausible suggestion that any such class that may stand in need of any special kind of governmental interference should be organised on the representative system into a partially self-governing body for the purposes of such interference. Thus, the farmers throughout the country, or in a certain district, might elect a Chamber of Agriculture, the traders might elect Chambers of Commerce, etc., to which certain powers might be given for the management of the details of such governmental interference as is needed for agriculture and trade respectively; on the ground that such bodies are likely to have more full and exact knowledge of the matters to be regulated, and of the probable effects of any given regulation, than any governmental organ otherwise appointed.[1] Certainly there would be some advantage in such an organisation: the counsels and criticisms of such bodies ought to furnish important instruction to government. But there is a strong reason against any considerable delegation of governmental functions to such bodies in a modern state, namely, that the interests of the industrial classes into which a modern community is naturally divisible, cannot ordinarily be more than a part of the interests that government has to consider in the case of any special interference. They are the interests of the *producers* of some commodity, material or immaterial, as distinct from those of the *consumers*; since the latter are usually too numerous and dispersed, and as individuals too slightly interested, to combine effectively

[1] It may be observed that trade guilds, at an earlier period of European history, actually exercised such powers of "sectional" government.

for the purpose of sectional government. Now a combination of producers usually tends to aim more or less at the advantage of monopoly; and its power of thus affecting adversely the interests of consumers calls for repression rather than encouragement from government. Only so far as the interests of any body of traders or professional men can be made to coincide with those of the community, can the former be safely entrusted with any share of the functions of government; and this result can usually be attained only to a very limited extent. This objection does not indeed apply to associations formed either for supplying the needs of the persons associated, or for promoting the general good of the community in some unremunerative way: but it is only in exceptional cases that such associations seem to require the intervention of government in their organisation and management. I may note, however, that special grounds for such intervention are widely held to exist, in the case of bodies of persons united by a common religious creed and the practice of similar religious rites. This case will be further discussed in a subsequent chapter (xxviii.).

# CHAPTER XXVI

## FEDERAL AND OTHER COMPOSITE STATES

§ 1. In the preceding chapter I noticed briefly the historical conditions to which great weight has to be allowed in dividing the territory of a state for purposes of local government; but I did not take these conditions into account in discussing the distribution of functions between central and local governments. Actually, however, the same historical considerations that are decisive in determining areas will often powerfully influence the division of functions. When states or parts of states which have either been formally independent, or have enjoyed a large amount of practical autonomy, are united, either voluntarily or through conquest, into one political community, the portions thus combined are likely to desire to retain important differences in laws and customs. Such differences may be intensified by differences in race, in religion, and generally in the level of civilisation attained; but independently of these the mere memory of the past may leave behind in such "part-states" a sentiment of nationality strongly opposed to complete absorption in the larger political whole of which they have become parts. In this way an extension of the powers of local governments may become expedient, considerably beyond what would be either desired or desirable, if a single tolerably homogeneous people had merely been subjected to different physical conditions, and spread itself over its common territory with different degrees of density.

But further, even in the case of such a homogeneous

people physical conditions may cause and justify a great enlargement of the powers of local authorities. The mere distance of one part of the territory from another may have this effect, especially when a nation is expanding in the way of colonisation; this is exemplified by the whole history of the English colonies, through all the varieties and changes in their forms of government.[1]

A state including parts that have, from one or other of the above-mentioned causes, a high degree of political separateness, may be called practically composite; even if the governments of its parts are regularly controlled by one supreme legislature and executive, so that its constitution still remains formally unitary. If a state thus constituted is under popular government and its supreme legislature is elected only by—or consists only of—the citizens who reside in a portion of its territory, the other parts of the state are commonly said to be "dependencies" of the portion to which the legislature is formally responsible: and a similar difference may practically exist under other forms of government, although the formal constitutional rights of the great majority of the inhabitants may be the same throughout the territory of the state. *E.g.* under absolute monarchy, though no part of the state can be formally a dependency of any other part, it may be so practically; the monarch may choose his leading subordinates exclusively or mainly from a portion of his dominions, and be practically under the exclusive influence of its public opinion. This position of dependence, whether formal or only practical, is calculated to cause discontent: and it is not likely to be permanently acquiesced in by communities habituated to popular government, and feeling themselves on a level in civilisation with the dominant community;—unless, indeed, they are very inferior in strength to the latter, or unless their exclusion from political rights is compensated by economic or other advantages, which would be generally likely to excite the jealousy of the

[1] The maintenance of the federal system in the United States may be partly attributed to a sense of the difficulty of governing its vast territory by the methods of a unitary state.

inhabitants of the dominant portion of the state. Hence, unless one portion of such a composite state is overwhelmingly superior in size and strength, there will be a tendency to an approximate equalisation of political status among the parts; and if, at the same time, there is a general desire to maintain the political separateness of the parts as well as their union in the larger whole, there will be a further tendency to demand a stable constitutional division of functions between the government of the whole and the governments of the parts, securing to the latter a substantial amount of legislative independence. We thus arrive at the general idea of a "Federal" state, as a whole made up of parts politically co-ordinate and constitutionally separate: though, as we shall presently see, there remain considerable divergences of view as to the exact definition of "Federality."

§ 2. A federal state has to be distinguished on the one side from a unitary state with well-developed local governments, and on the other side from a league or confederation of independent states: but in neither case is the distinction simple and sharp, since the balanced combination of "unity of the whole aggregate" with "separateness of parts," which constitutes Federality, may be realised in very various modes and degrees. It will be well therefore to examine either distinction carefully before we consider the circumstances under which any form of federal constitution is expedient.

The clearest formal[1] difference between a federal state and a unitary state whose parts are approximately equal in political privileges is, as I have just said, that in the former

[1] We doubtless find in history instances of federal unions in which there was no clear and precise constitutional division of powers, although practically the parts retained their independence, while effectively united in a larger whole. And no doubt a modern state might be *practically* federal, without a precise and stable division of powers, if the substantial autonomy of the parts were maintained by custom and public opinion. But if the central legislature were recognised as having the power to abolish this autonomy, I should regard the state as *formally* unitary; and if the point were left doubtful, I should regard the form of government as seriously lacking in definiteness. And such lack of definiteness is not merely a theoretical defect: it involves an obvious risk of friction and conflict between the government of the parts and the government of the whole.

the power of the ordinary legislature of the whole is constitutionally limited in favour of the autonomy of locally[1] distinct parts. But we may further lay down (1) that unless this autonomy is considerable in extent, it would be paradoxical to call the state federal; (2) that when the federality is well marked, the compositeness of the state will find expression somehow in the structure of the common government; (3) that if the federal character of the polity is to be stable, the constitutional process of changing the constitutional division of powers between central and local governments must be determined in harmony with the principle of federalism.

Let us consider briefly each of these three conditions:—

I. In laying down that the autonomy of the parts of a federal state must be considerable in extent, I mean that we should hardly call a state federal merely because the independence of local governments in certain minor matters was guaranteed by the constitution. At the same time, we cannot say that Federality implies any definite division of functions between the governments of the parts and the common government of the whole. The principle of federal union is sometimes stated to be that the federated parts are to be independent as regards "internal matters," while they have a common government for "external matters." And no doubt this statement indicates roughly the line of division that is both usual and expedient. But, firstly, it leaves doubtful how matters external to the parts but not to the whole—matters that concern the mutual relations of the parts—are to be determined; and this intermediate region is very important in modern states:—for instance, hardly any point is likely to be more vital for the cohesion and stability of a federal state than to secure free trade among the federated part-states.[2] And, secondly, matters *primâ*

[1] Theoretically we should perhaps include the case in which parts divided by race or religion, and not by locality or habitation, have a substantial autonomy; but the term "federal" is not usually applied to such combinations.

[2] The constitutional prohibition of restrictions on commerce among the federated part-states has been of fundamental importance in the history of the North American Union.

*facie* internal—in the strictest sense—to each part may be of serious common interest to the whole, on account of the mischief or waste of labour caused by want of uniformity, as was pointed out in the preceding chapter. This is the case (*e.g.*) with such matters as regulation of currency, patents and copyrights, bankruptcy, and generally commercial law—and, in short, all such matters as it would be most palpably unwise to assign to local governments in a unitary state. Such matters as these should undoubtedly be included in the province of the common government, —at any rate if the federal territory be approximately continuous — no less than the management of foreign relations, and the organisation and the control of the military forces necessary for protection against foreign aggression. Again, the common government ought to have the power of enforcing the fulfilment of international obligations, and this must occasionally involve interference in the internal affairs of the part-states, to suppress or punish conduct mischievous to foreigners. It may even be expedient for the wellbeing of the whole that the internal political constitutions of the part-states should be to some extent determined in the federal constitution; owing to the mutual disturbance which polities based on fundamentally diverse principles are likely to cause if brought into close contact through federation.[1]

It may be further noted that the federal character of the whole state becomes more marked if the powers of the common government are defined, while those of the partial governments are left indefinite in the constitutional division; that the residuary powers belong to the part-states.

II. It is a natural, if not a necessary, characteristic of a federal polity that the separate political existence of part-states as members of the whole state should be somehow represented in the structure of the common government. This may be done in various ways and degrees: (1) as the part-states, if independent, would be formally equal in international rights,

[1] On this ground the North American Union prescribes a republican constitution as an absolute condition of membership.

their partially retained independence may be represented, by giving to all equal shares in the election of some important part of the common government, so that normally any decision of the body or individual so elected will represent the decision of a majority of the part-states. If, however, the part-states are very unequal in size, this arrangement may be rejected as conflicting too strongly with the constitutional right of a majority of citizens to determine in the long run the policy of the common government. (2) In this case another method may be adopted of representing the separateness of the part-states: a representative body may be constituted as part of the common government, in which representatives of each part-state vote not individually but collectively, according to the decision of a majority of their number; the aggregate voting power of each set of representatives being proportioned to the size of the part-state that they represent. (3) The federal character of the polity may be still further accentuated by making it the constitutional duty of the representatives to conform to instructions received from the governments of the respective part-states. This last plan, however, is objectionable as tending to hamper inconveniently the deliberative independence of the governmental organ composed of these delegates.

III. It remains to consider how far, and in what way, stability is to be given to this balanced division of governmental powers between whole and parts. In a "unitary" state the division may depend entirely on the will of the central legislature; the powers (*e.g.*) of our county councils were given by Act of Parliament, and another Act of Parliament might take them away to-morrow. But I have regarded it as characteristic of a federal government that the ordinary central legislature has no such unlimited power of modifying the division of power between itself and the legislatures of the separate federated states: the division is fixed by the constitution, which the ordinary central legislature, no less than the local legislatures, is bound to obey. It is conceivable that the rules of such a constitution should be immutable, *i.e.* that there should be no legal method of

changing them. But such immutability is indefensible from a utilitarian point of view; and would, I think, be generally condemned by political thinkers of all schools at the present day. We realise too fully the inevitable changes of social needs and conditions, and the limitations of human foresight, to approve of establishing constitutions that cannot be altered without illegality. Hence a federal constitution must include a governmental organ, having the function of modifying the constitution when a change is required.

It is not, indeed, absolutely necessary that the modifying organ should be different from the ordinary central legislature, provided the process of changing a constitutional rule be made more difficult than that of ordinary legislation; as (*e.g.*) by requiring a majority of two-thirds or three-fourths in every branch of the legislature. If in one branch of the legislature the part-states are equally represented, this arrangement will secure that no change is made unless supported by the representatives not only of a decided majority of citizens but also of a decided majority of part-states. But it would seem better to attain the same result directly, by making the consent of a majority—or, if greater stability is desired, two-thirds or three-fourths—of the legislatures [1] of the part-states necessary to the validity of a change in the federal constitution. It might even be plausibly maintained that the principle of Federalism, strictly taken, requires that the consent of any part-state should be given to any change in the constitutional division of powers between the whole and the parts; on the view that the powers allotted to the part-states belong to them independently, in their own right, and being not conferred by any authority external to the state, cannot legitimately be withdrawn by any such authority. But, while admitting that a federal constitution ought to be stable, I think this degree of rigidity would be in most cases inconvenient; since it would render any constitutional rule—however inexpedient it might turn out to be—unalterable without revolution, if it was the decided

[1] The legislatures appointed for this purpose in the respective part-states need not be the ordinary legislatures.

interest of a single part-state to maintain it. This form of federality seems to me rather suitable—not to a federal state but—to a federal union of states dissoluble at will.

§ 3. We are thus led to the second distinction required to complete our definition of a federal state; we have to distinguish it from a federal union, which is not held to be a state, but a Confederation or league of states. Such a confederation may vary indefinitely in closeness:—*e.g.* the term is sometimes applied to a mere Alliance for a limited time, which does not result in the formation of any important common organ of government. By a "confederation," however, I shall here mean a union of states designed to be permanent; and if states unite for permanent common action in important matters, they are likely to establish some common organ having power to make decisions of importance in respect of this common action. The most obvious motive for such a union is to gain security and strength in foreign relations; but this end is hardly likely to be permanently attained unless there is some common council, authorised to represent the aggregate of the confederated states in any dealings with states outside the union, —as well as common management of military forces in case of war. If such a permanent organ of common government is established, the union clearly goes beyond a mere Alliance. At the same time, to secure the strength that union gives, it would seem almost indispensable to prevent wars within the confederation, and therefore to give to the same or some other organ judicial functions for the settlement of disputes among the confederated states. Combination to this extent will further render it convenient to have a financial organ to determine the contributions of the different states for common purposes.

Taking some such scheme as this for a starting-point, it is obvious that the powers of the common government might be gradually extended, and the relative importance of the part-states gradually reduced in the same proportion. The question then is, whether we can mark any definite point of transition at which unity predominates over

plurality, and the "confederation of states" passes into the "federal state." I do not think it important to decide this question dogmatically;—like other questions of definition it comes ultimately to be a question of words—but it may be instructive to consider briefly the different grounds on which the line may be drawn. (1) It may be plausibly held that the essential separateness of the part-states is sufficiently maintained, so long as they have the power of withdrawing from the union, whatever be the extent of the revocable powers that they agree to allow to the central government; (2) it might even perhaps be held that this separateness is sufficiently maintained, so long as the constitutional division of powers between whole and parts is not alterable without the consent of all the parts; (3) on the other side, it might be held that so long as the federated communities are completely united and represented by a common government in their relations with foreigners, they become a single state from an international point of view, however complete may be the internal independence of the parts. (4) For my own part, I should prefer to take a different criterion from all these; I should consider that the union attains the unity of a state only if the central government enters normally into important direct relations with the citizens, and does not merely act on them through the governing organs of the part-states. For instance, if there is a federal legislature whose laws in certain matters are binding on the citizens as individuals, a federal judiciary to decide, in the last resort, whether these laws have been obeyed or not, and a federal executive that deals normally with individuals, as such, in performing its work of carrying out the laws, compelling obedience to them and collecting taxes, I should call the union a federal state; while if the central government only acts on individuals through legislatures, executives, and judicatures of the part-states, I should prefer to call it a confederation of states. The distinction between the two cases seems to me of the deepest character from the point of view of an individual member of the community; since in the latter case the individual citizen

will have a habit of undivided allegiance to the government of his part-state—with which, therefore, he will naturally side if any dispute should arise between central and local organs—whereas, in the former case, it will be his recognised and habitual civic duty to obey either government within its own sphere. It is, then, this habit of divided allegiance that I take to be the most distinctive characteristic of a federal state, as contrasted with a confederation of states.

§ 4. A consideration of this divided allegiance raises a question of fundamental importance in the construction of a Federal government. Suppose that governmental powers are divided by a federal constitution between central and local organs: how is the division to be practically maintained? how are the different organs to be practically kept within their constitutional limits? If there is a conflict between the common government and the government of the part, is the private citizen to determine for himself whom to obey? or, if not, how is he aided in determining it? A case somewhat parallel may occur in a unitary state, even when the legislature is formally unlimited, if the executive issues commands in excess of the powers conferred on it by law. Here, however, it would be clear—according to the principle laid down in chap. xxiv.—that the private citizen might refer the point to the judiciary, who would pronounce upon the legality of the command. The same method[1] is obviously applicable in the present case: the courts of law can treat as invalid any commands of either central or local legislature that conflict with clauses of the constitution. And where the principle of federality is thoroughly carried out, there is a special advantage in dealing with the question by a strictly judicial method; since the balanced division of powers which belongs to the essence of federality is especially likely to lead to disputes as to the exact limits of the divided powers. But it is evident that the position of the judiciary relatively to either

[1] Other methods of dealing with this problem will be noticed in the next chapter, § 4.

central or local legislature will be materially different from that which we have so far contemplated, if we assume the former to have the duty of sitting in judgment on the legality of the acts of the latter: and the more stability is given to the constitution by making the process of changing it difficult, the greater becomes the importance of this judicial function of interpreting its clauses. In order that this function may be well performed, the supreme court of justice must be made adequately independent of both central and local legislatures, no less than of the executive governments: and it is a delicate problem to find conditions of appointment and tenure that will secure this independence, without at the same time giving the supreme court too predominant a power.

Perhaps we may suggest that the members of this court should be appointed for life; that no additional members should be added without the consent of the court; and that no member should be removed from office except either (1) by a tribunal of which the greater part consists of judges of this court, or (2) in the last resort, by the process provided for effecting a change in the constitution.

Apart from the question of the decisive interpretation of constitutional rules, the chief special problem presented by the construction of a Federal Government, is to provide adequate security that the different interests of the part-states are duly regarded in legislation. So far as this security is provided by the constitution, federal sentiment will tend to make the constitution stable by requiring the assent of a large majority of part-states—as represented either by ordinary or extraordinary legislatures—to any change in the constitution.[1] And where the part-states are either numerous or not very unequal in size, it does not seem that any further security—beyond that given by ordinary representative government—is necessary to protect the sectional

[1] Thus, in the North American Union, the assent of three-fourths of such legislatures—as well as two-thirds of either house of the federal congress—is required. This requirement has rendered the constitution so stable that only five amendments have been passed in a century, three of which represent the result of a civil war of four years' duration.

interests of the part-states, so far as they are affected by the action of the federal legislature within the limits of the constitution. But where the part-states are so few or so unequal in size that a single part, if represented in proportion to its numbers, would tend to preponderate in the central legislature, the smaller part-states incur a certain danger of becoming practically dependencies of the larger—so far as the action of the central government is concerned—at least if the preponderant part-state has important separate interests, or strong particularist sentiment. Such a danger may, as we have seen, be averted by giving equal representation to the part-states in the Senate. It seems, however, improbable that this arrangement would be accepted by a large part-state if the inequality of size were very great—*e.g.*, if one part-state was larger than all the rest put together; while the other plan before mentioned of expressing Federality in the constitution of the common government—by making the representatives of each part-state vote collectively—would much increase the danger of undue preponderance of a large part-state. If, therefore, the parts of a Federal State are few, it is better that they should be not very unequal in size: and the fewer they are, the smaller is the inequality that would be dangerous.

I have assumed that the part-states will be approximately equal in political privileges. Of course Federality is not destroyed by the allotment of some minor special privileges to particular part-states; such special privileges, however, are hardly likely to be secure unless the constitution provides that they cannot be withdrawn without the consent of the privileged states;[1] and this provision may render them inconveniently stable.

§ 5. I pass to consider the reasons for forming a federal union—either in a closer or in a laxer form. Firstly, it enables small independent communities not strongly divided by interests or sentiments, to escape the chief military and economic disadvantages attaching to small states, at the

[1] Several German part-states—especially Prussia, Bavaria, and Wurtemberg—have such special privileges in the present German Empire.

least possible sacrifice of independence. A small state with large and powerful neighbours incurs some danger of high-handed aggression — though the mutual jealousy of the neighbours may often render this remote and vague—and it incurs the milder but more certain disadvantage of being obliged to yield in disputes where the question of right is ambiguous. Further, so long as modern states endeavour, by elaborately arranged tariffs, to exclude or hamper the competition of foreign producers in their markets, it will generally be some disadvantage to the members of a small state that they can only rely on a comparatively small area of unrestricted trade. Of these disadvantages, military weakness has been historically most important; if we examine the leading instances of federations in modern history—Switzerland, Holland, and the United States of North America—the fear of foreign subjugation or interference appears as the main cause of the union of the federating communities. In the case, however, of North America, though the first federal union was due to the war of independence, commercial considerations had a large share in bringing about the second and more stable union of 1789; and, as the federal state has grown and expanded over the North American continent, the advantages of the federal union as a means of preventing commercial exclusions as well as internal wars have become more prominent.

Further, North America may also illustrate the advantages of federalism from a different point of view; *i.e.* as a mode of political organisation by which a nation may realise the maximum of liberty compatible with order: since, as we have already seen, the amount of governmental coercion is likely, *ceteris paribus*, to be less, in proportion as the powers of local governments are extended at the expense of the central government. It seems, indeed, very doubtful how far a body of persons, as independent in sentiments and habits as the English colonists of North America, would have held together upon any other terms than those of a federal union, when sparsely distributed over so large a territory as that of

the United States. For the federal form of polity also diminishes—in proportion as the functions of the central legislature are restricted—the practical difficulties[1] which extent of territory tends to throw in the way of good government; especially the difficulty of enforcing obedience if the inhabitants of distant districts are recalcitrant, and the difficulty of securing that the central government is sufficiently informed as to the needs of such districts. These difficulties combine to place natural limits to the size of an orderly and well-governed state, if remaining practically unitary,—limits indeed of a vague and elastic kind, and greatly extended in recent times by railways and telegraphs, but which still cannot be ignored in considering the government of a territory as large as that of the largest actual states.

The chief disadvantages of Federalism have been incidentally noticed in the preceding chapter, when we were discussing the proper limits of the powers of local government in a unitary state. I have there sufficiently dwelt on the drawbacks of localised legislation in a country whose parts are in active mutual communication. I also pointed out that the strength and stability which a state derives from internal cohesion tend to be somewhat reduced by the independent activity of local governments, if the latter can be effectively used as centres of local resistance to the national will; it is obvious that in a federal state the danger from this latter source is greater, owing to the habit of divided allegiance that belongs to federality; while in a confederation of states the cohesion is—and is designed to be—weaker still, because the loyalty of the ordinary citizen is concentrated on his own state.[2] On the other hand, if

[1] It may be remarked that these difficulties tend to be increased if long intervals of seas are interposed between different parts of the territory, preventing the continuous expansion of the community, and tending to render the circumstances of its divided parts materially different.

[2] Hence hereditary monarchy—so long as it is sustained by an effective sentiment of personal loyalty—has a peculiar utility in the way of strengthening the looser form of federal union; if the uniting states will accept the same monarch.

disorder and disruption are prevented, the federal form of polity, requiring as it does a rigid and stable constitution to secure the partial independence of the part-states, is exposed to the general objections which may be urged against such a constitution as compared with a more flexible one.[1]

In conclusion, it may be observed that federalism is likely to be in many cases a transitional stage through which a society—or an aggregate of societies—passes on its way to a completer union; since, as time goes on, and mutual intercourse grows, the narrower patriotic sentiments that were originally a bar to full political union tend to diminish, while the inconvenience of a diversity of laws is more keenly felt, especially in a continuous territory. Partly for the same reason, a confederation of states, if it holds together, has a tendency to pass into a federal state. But differences of religion, race, historical traditions, may indefinitely retard either process.

§ 6. Several of the distinctions drawn in defining Federality apply *mutatis mutandis* to a composite state, of which one part is dominant and the rest dependencies. Thus, a dependency may be simply a part-state that has no constitutional control over the government of the whole, while practically enjoying the same independence as a federated part-state in the management of its internal affairs. Or it may have merely the more restricted self-government of a district in a unitary state. Or, on the other hand, the government of the dominant part may merely exercise the power of the common organs of government in a Confederation;—or it may have even less formal power, since, just as Confederation shades off into mere Alliance, so the position of a Dependency shades off into that of a Protected state. For though, in speaking of the external relations of states, I have usually for simplicity assumed the states to be completely independent; still in fact we have to recognise various relations of protection intermediate between complete dependence and complete independence.[2]

[1] These objections will be considered in the next chapter.

[2] If a favourable position is secured to a dependency by a treaty regarded

If we ask the best mode of governing dependent part-states, the answer must vary with the varying conditions under which the relation is suitable. Where the dependence is compulsory or semi-compulsory,—due to what we may assume to be legitimate conquest,—there is an obvious reason for not allowing the unwilling members any influence on the government of the whole; which is also a sufficient reason for keeping the organised force of the dependency entirely in the hands of an executive organ appointed and controlled by the dominant government, and for making the assent either of this organ or of the dominant government practically as well as formally necessary to any special legislation required for the dependency. It is a more difficult question how far such legislation should be ordinarily allowed to be framed by a representative assembly, freely elected by the citizens of the dependent community—supposing them to be adequately homogeneous and civilised, and otherwise fitted for representative institutions. On the one hand, such an assembly is likely to become the mouthpiece of disaffection, and to render combination easier for the purpose of hampering and resisting the dominant government: on the other hand, so far as it works effectively within the sphere assigned to it, its operation is likely to diminish discontent and improve legislation; since it will be generally difficult to devise a satisfactory substitute for such a body, as a means of ascertaining the real needs of the population of the dependency. The decision in any particular case must depend largely on the extent and intensity of disaffection in the dependency; since, so long as this is extensive and violent, the risk of facilitating dangerous organised agitation, through the election and operations of a representative legislature, would generally outweigh any probable gain in the way of pacification or useful legislative work. Similar considerations must also largely determine the answer to another important question,—viz. how far the subordinate posts of the execu-

as having the stability of a constitutional rule, the relation assumes an intermediate character, partly resembling Federality.

tive and the judiciary in the dependent country should be filled from the inhabitants of the dominant country. Generally speaking, it is an inevitable disadvantage to a dependency of this class that the work of government has to be largely performed by foreigners; who are usually more costly than natives, and—other things equal—more likely to show selfishness and rapacity; and who, even when well-intentioned, are liable to understand imperfectly the laws and institutions of the country they are governing.

As to the form of government for dependencies of this kind, it may be observed firstly that, owing to the special need of promptitude, decision, and often secrecy, a monarchical organisation seems generally suitable to the executive of the dependency; secondly, that if the dependency be distant from the dominant country, it is important that it should have a special central organ of government in the dominant state—besides its local organs—in order that the dominant government may make as few mistakes as possible from lack of knowledge.

§ 7. Let us now consider the case of a dependency that is such voluntarily and contentedly. This relation may result either (*a*) from the voluntary union of states previously independent, or from union originally compulsory, out of which the element of constraint has vanished through lapse of time; or (*b*) from the expansion of a community into new territory. In the former case, the relation of dependence may be an acceptable arrangement when the gain in the way of protection, trade, etc., is felt by the dependency to be worth the price paid for it—whether in taxation or in loss of independence;—while the dependency is too much attached to its peculiar institutions to acquiesce in absorption by the dominant country, and at the same time the inequality of size is so great as to render the federal relation somewhat unsuitable.

A more important case for modern states is that of dependencies resulting from the expansion of a unitary state into new territory. This process would not necessarily tend

to this result, if the new territory colonised were continuous with the old, and were also empty, and not too large. Some special legislation would indeed be required to determine the conditions of appropriation of land and natural resources: but so soon as the new districts became sufficiently peopled under these conditions, they might have local governments similar to the rest, and similar representation in the central Parliament. But, as we have seen, after the whole territory had thus been enlarged beyond a certain size—varying with the development of the arts of conveyance and communication—good government according to the methods of a unitary state would tend to become more difficult: and the difficulty would arise sooner if the expansion took place across a broad interval of sea, as the physical separation thus caused is likely to be attended by a marked difference in the conditions of the social life of the colonists, and consequently in their needs of governmental interference. For these colonial needs a central government constructed on the representative system can hardly be expected to legislate successfully; the mass of members of Parliament would tend to be too ignorant, and the representatives of the colonies too few in number and liable through distance to lose touch of their constituents, and to be absorbed in the political movements of the mother-country. This being so, the local government of the colony has a reasonable claim for an independence far exceeding that of a local government in the old country: and if this is granted, it appears unreasonable that representatives of the colony that enjoys this extent of autonomy should take part in managing the domestic affairs of the mother-country. Under such circumstances, the principle of Federation is *primâ facie* applicable; but, as we have seen, the great inequality in size of the parts that would be federated constitutes a special objection to its application. If, for this or other reasons, a Federal union is out of the question, the best temporary substitute seems to be to constitute the colony self-governing within a sphere somewhat similar to that of a part-state in a Federation, but

without any formal control over the operations of the central government of the state of which it is a part.

The exact extent to which this colonial self-government should go must vary considerably with the degree of development of the colony, its situation and external relations, and other circumstances. It should also partly depend on the conception formed of the desirable ultimate destiny of the colony,—*i.e.* whether this is to be a permanent political connexion with the mother-country, probably in a federal form, or complete independence, with perhaps some special tie of alliance:[1] Thus, if the connexion is designed to be permanent, the colony should not have the power to tax or otherwise restrict its external trade without the consent of the mother-country; since the industrial separation which tends to result from a protective tariff will render political union more difficult to maintain.

In any case, the position of dependence is not likely to be found permanently satisfactory,—at least for such colonies as I have before distinguished as "colonies of settlement," in which the population is mainly derived from the dominant state. In such colonies, when they have reached a certain pitch of population and wealth, the absence of any control over the central government—even though compensated by a corresponding reduction in the burden of taxation—is likely to be felt as a grievance whenever the colony and the mother-country have conflicting views on matters which affect the interests of the former but are entirely under the management of the latter. Friction

[1] As complete political separation between a colony and its mother-country is most likely to be due to a real or supposed divergence of political interests—especially in foreign affairs,—the same cause will probably render any alliance between the two for military purposes transient and precarious. Still, it may be hoped that in future any political divorce that may take place between a civilised state and its colony may be effected without a violent rupture; and may accordingly leave behind, in the separated nations, such sentiments of goodwill and habits of friendly intercourse as may tend to maintain a durable peace between them. Perhaps this result might be promoted by a mutual grant of the full rights of citizenship, without formal nationalisation, to emigrants from either country into the other,—an arrangement quite compatible with complete political independence.

and discontent from this cause will be specially liable to occur in the department of foreign affairs; since the central government, being responsible to foreigners for all acts and omissions of the colonists, will be imperatively bound to interfere to prevent violations of international right, however much such interference may run counter to the wishes of the colonists generally. Under these circumstances, special care is required in organising the department of the central government that has to manage those colonial affairs, in which the interests of the mother-country are too much involved to leave them entirely to the colony. The head of the department should be advised by a council carefully selected from persons who have empirical knowledge of the different colonies: and the self-governing colonies should be encouraged to use any convenient channel for making their needs and wishes known to the central government. How far the executive for home affairs in such colonies should also serve as a subordinate executive for the business of the central government, appears to me more doubtful; since, if the matters administered by central and local governments respectively can be clearly divided, there would seem to be important advantages in keeping the two governmental organisations distinct, so far as economy of labour allows.

One specially important peculiarity usually found in the circumstances of colonists is, that the territory colonised is partially occupied by less civilised societies, whose relations to the colonists require careful regulation. To impose on the colonists unaided the task of dealing with these "aborigines" would in some cases involve a serious risk of bloodshed: the forces of the mother-country would have t intervene at a certain point; and, so long as there is any danger of this, it seems clearly expedient that the mother-country should retain sufficient control over the colony to enable it to interfere effectually before this point is reached. Even when the colonists have overwhelming superiority in physical force—which soon comes to be the case, if it is n t the case at first, in colonies of settlement—the greater im-

partiality that may be reasonably attributed to the home government seems to render it generally desirable that the management of the aborigines should not be regarded as an "internal affair" of the colony, so long as there is any serious danger of a conflict of races or persecution of the inferior race.

But, as was before said,[1] the question of the relations to be established between colonists and aborigines is most important in colonies where the manual labour can never be in the main supplied by the superior race: since here the composite character of the population must be regarded as permanent unless the races blend. To a society so constituted the governmental structure sketched in the preceding chapters is *primâ facie* unsuited: but the extent and nature of the modifications that should be introduced into it must vary very much with the degree of civilisation actually reached by the inferior race, and its apparent capacity for further improvement. It will be difficult to prevent a simple oligarchy of the superior race from being tyrannical: on the other hand, it seems a desperate resource to give equality of electoral privileges to members of the inferior race while admittedly unfit to control the operations of government, in the mere hope that experience may in time educate them up to a tolerable degree of fitness. So long as the composite society presents this dilemma, it will probably conduce to its wellbeing as a whole that the colony should remain a dependency; so that, even where the business of government is mainly left in the hands of the colonists, the control of the central government may prevent or mitigate any palpable oppression of the inferior race.

[1] Chap. xviii. § 8.

## CHAPTER XXVII

### CONTROL OF THE PEOPLE OVER GOVERNMENT

§ 1. In the preceding chapters we have been considering the structure of governing organs, on the assumption that government is a business requiring special gifts, training, and practice; and that, accordingly, it ought to be placed in the hands of a special group of persons, carefully selected for the purpose. We have now to turn to an important question, briefly noticed and postponed at an early stage of the discussion, viz. what share in the work of government should be assigned, in a modern civilised community, to the mass of the citizens? In some ages and countries it has been the prevalent opinion, the established constitutional doctrine, that the mass of the people "have nothing to do with the laws but to obey them." But this is not the view upon which our construction of government has proceeded. In framing our supreme legislative and executive organs we have adopted, in the main, the principle of "representative" or "responsible" government; we have regarded it as fundamentally important, not only that governors should be subject to the watchful criticism of the governed, but also that the latter should periodically, in selecting their governors, pass judgment on the political conduct of those who seek their suffrages a second time. It remains to consider whether this indirect influence on government is sufficient, or whether there should be further any direct intervention of the

citizens at large — whom, for brevity, I will call "the people" — in legislation or governmental administration.[1]

This question is closely connected with another of fundamental importance: viz., whether the freedom or interests of individuals should be protected from encroachment on the part of the legislature by any constitutional rules, which the ordinary legislature is bound to obey. For, if the latter question be answered affirmatively, the direct intervention of the people is a simple and obvious mode of providing for the changes that may be from time to time required in the constitutional rules restraining the ordinary legislature. English political experience, however, has afforded no example either of constitutional limitations on the legislative power of Parliament, or of direct intervention of the people at large in government; the prevailing view in Western Europe would seem to be that the latter is inexpedient in a well-ordered state; and in England at least it is thought that the old difficulty "Quis custodiet ipsos custodes?" is sufficiently met — in the case of the legislature — by establishing representative government. And certainly in a state in which the fully qualified citizens directly appoint, at intervals of a few years, the members of the chief organ of legislation, and directly or indirectly determine the heads of the executive departments, no governmental aggression on the rights of individuals is likely to take place, except such as the majority of fully qualified citizens receive with at least acquiescence. This acquiescence may indeed be due to a want of full perception of the effects of governmental measures, or a want of ready sympathy with the persons who are most directly injured by them: accordingly, in order that the protection afforded by the representative system may be as effective as possible, it is important that any persons aggrieved by the action of government should have the opportunity of arousing the attention and interest of the mass of their fellow-citizens, by oral and written discussion.

[1] The arguments for and against the intervention of a casually selected group of ordinary citizens in judicial work have already been considered.

And, speaking more generally, in order that the function of electing legislators and administrators may be well performed by ordinary electors, it is recognised as desirable—we may say indispensable — that they should be enlightened and stimulated by full and free criticisms of current legislation and administration.

Hence freedom of speech, freedom of the press, freedom to assemble peacefully for the consideration and emphatic statement of political grievances, are, in the view of Englishmen, an essential part of the "free institutions" on which they pride themselves; but it has never been felt to be necessary that these or any other rights of individual citizens should be protected against the ordinary legislature by any constitutional rules having legal force. It is held that they will be sufficiently protected by public opinion and the representative character of the legislature.

Accordingly, before considering the expediency of any further restraints on the ordinary legislature, beyond what the representative system provides, it seems desirable to ascertain the exact relation which the right of periodical election should be held to establish between the members of the representative assembly and their constituents. In one view of this relation, the essence of representative government is that the people represented govern through their representatives: the latter are regarded as agents, appointed to carry out the wishes of their constituents, and properly liable to dismissal if in any point they insist on carrying into effect their own judgment, in opposition to the judgment of those whom they "represent." This view is manifested in the demand sometimes made by a constituency that their representative should resign because he does not vote as they like, in the statement that the House of Commons has not "received a mandate from the electors" to do such and such things,— and similar utterances, common in England at the present time.

This view is very naturally suggested by a consideration of the historical origin of representative government. I shall begin therefore by pointing out that the form of

representative government actually established in this and most other European countries — Switzerland being an exception — is in any case ill adapted for realising this conception of its spirit and design.

§ 2. If the framers of a constitution really aimed at making the will of the majority, at any given time, supreme in legislation, it would be easy to make regulations which would at any rate secure a much closer approximation to this result than is realised under the ordinary representative system of government. It would be easy to introduce what is known in Switzerland as the "Obligatory Referendum[1]": *i.e.* to treat all parliamentary deliberation as merely preliminary, and enact that all Acts of Parliament should be submitted to the electors for formal approval before they become valid as laws. It would be possible, indeed, to go further still, and introduce the right of "Initiative" actually established in some Swiss cantons: *i.e.* to make it the duty of the Legislature to publish legislative proposals brought forward by a certain proportion of the electorate, and cause them to be voted on by the constituents at local polling places. Perhaps it may be held that it would be absurd to throw on the people at large the actual work of legislation,—since the people only form general aims and wishes, for which it is the business of the legislative expert to supply appropriate particular rules fit to be enacted,—but that these general aims and wishes should be regarded as paramount by a representative legislature. And certainly it would be difficult for the citizens at large to perform effectively the complicated discussion that is often required to mould a legislative scheme into the most acceptable form. Nor would it be practicable for the constituents to direct the action of the representative in every detail during such discussions; since it would sometimes happen that compromises and modifications were suggested at the last moment, rendering any previously expressed wishes of the constituents irrelevant to the issue finally put to the vote; while to give

[1] In contrast to the "Facultative Referendum": by which a measure is referred to the popular vote, only when such reference is demanded by a certain number of citizens.

time for a reference to the constituencies in all cases would involve intolerable delay. Still this difficulty need not prevent the allotment of a large share of direct control to the people at large. For a substantial amount of such control could be secured to a constituency by making it the constitutional duty of a representative to conform in his parliamentary voting to all clear and precise instructions laid down by a majority of his constituents; and it would be easy to arrange that—except in case of urgency—no clause of a law should be finally passed by a representative assembly, without time being allowed for a vote of the citizens in any constituency; and that any resolution passed by a majority of those voting should be binding on the representative. It would probably be inconvenient to allow legal doubts to be raised as to the validity of laws, on the ground that the legislators had disobeyed their constituents; but the simple expedient suggested by Bentham, of giving such a majority the right of dismissing a representative at any time, would generally suffice to prevent any wilful disobedience; and, assuming that elected legislators are to be regarded as mere agents of their electors, it seems clearly most consistent to make them thus promptly dismissible. Or, perhaps —to avoid the practical mischief of distracting the attention of the elected legislator from his legislative functions—it would be better, if this view were adopted, to renew his appointment annually; taking a vote of the electors, in case of a contest, during the parliamentary vacation; and the final ratification of the legislative measures of the year might be deferred till this annual election, so as to give the people a regular opportunity for cancelling any unpopular legislative innovation.

These suggestions have a paradoxical appearance. But I am seriously disposed to think that, if the doctrine which reduces the representative to a mere delegate, bound to carry out from day to day the wishes of his constituents so far as he can ascertain them, were firmly established as a part of constitutional morality, there would be important advantages in making this obligation more definite and stringent

by such arrangements as I have above suggested. For, if this were done, the electorate would express their wishes under a more serious sense of responsibility, and their real desires would be more likely to be ascertained; it would be less easy for a fanatical or intriguing minority to assume the semblance of a majority.[1] At the same time, I do not think that changes of this kind would bring us to a system of government which is either abstractly desirable or the best attainable. I think that the periodical election of legislators should be understood as a selection of persons believed to possess superior political capacity; and, if it is so understood, I think it reasonable to assume that the responsibilities and experience of such persons must tend materially to increase their original advantage in political insight. I therefore think that it cannot conduce to good government to let their judgment be overruled at any moment by the opinions of a comparatively ignorant and inexperienced majority. I consider, on the contrary, that a member of government who does not follow his own best judgment in the exercise of his governmental functions—even when it brings him into conflict with the temporary opinions and sentiments of a majority of his constituents—should be held guilty of a plain dereliction of duty.

It may perhaps be said that the absurdity of "folly controlling skill" is inherent and inevitable in the system of government that we have been throughout contemplating: that, in any case, the ignorant have to judge the experts, at the periodical election, which is just as absurd as overruling their judgment at any other time; and that the prospect of this judgment must cause elected governors to yield to all decided popular prejudices and wishes. I admit the force of the objection. I think, however, that the practical danger that it signalises may be very materially reduced, if the duration of parliament be adequately prolonged; for if a

[1] Similar arrangements might be made for bringing the Supreme Executive under direct popular control; but I have not thought it necessary to work these out, as I think that the disadvantages of such arrangements would in any case outweigh the drawbacks.

body of electors is normally called upon to express a practically decisive opinion on the conduct of their representative only at intervals of some years, the more intelligent electors will be able to judge of many important parts of his conduct after events have unmistakably shown their wisdom or unwisdom. This consideration, I hold, shows us the grounds on which the proper duration of parliaments should be determined: while they should not be so long as to weaken the sense of responsibility in the person elected, they should be long enough to give an honest and intelligent elector a fair opportunity of taking the measure of the intellectual and moral qualifications of his representatives. It is, of course, impossible to deduce from general considerations the exact number which fulfils best these two conditions: but I may perhaps say that a period of five, six, or even seven years, appears to me to fulfil them very fairly. A period of this length gives the electors fair opportunities of judging, with regard to members of parliament who offer themselves for re-election, whether they have consistently carried out the principles and pursued the aims avowed by them at the time of their election, and how far their forecast of consequences has been confirmed by events; while on the other hand, the period is not long enough to lead either side to forget the promises and predictions made at the beginning of the period, or the account which will have to be rendered at its close.

I have spoken of "promises"; but, on the principle above laid down, no *Pledges*, strictly speaking, should be required of candidates by their constituents. Declarations of opinions and present intentions may reasonably be given and demanded, and are indeed necessary, if the responsibility of the representative to his constituents is to be effectively maintained. It is also reasonable that new candidates should be partly chosen for the conformity of their declared opinions and intentions with the views of their constituents. It is not to be expected that the latter should choose a representative who disagrees with them on matters affecting their interests, and falling within the range of their personal experience; it is not to be desired that any

considerations should induce them to elect an avowed supporter of measures opposed to their moral convictions. But in dealing with questions of political expediency, recognised as such, and on which they cannot suppose themselves to have empirical knowledge, it can hardly be the duty of every citizen of a free community to construct for himself a set of fixed political dogmas, and to adhere to them in defiance of the judgment of any other person, however greatly his superior. It rather appears to me important to keep alive in the mass of comparatively ignorant and uneducated persons a due consciousness of their inferior means and opportunities of forming a judgment on most political questions, as compared with the means and opportunities possessed by persons of more education and leisure. What the electors have to do is to choose the man best qualified for the business of government, not to teach him his business: and they have obviously in many cases means of judging of the candidate's qualifications other than that of ascertaining his agreement with their own opinions on contemporary political questions;—such as specific experience of matters, public or private, which he has managed well, or evidence of grasp and reasoning power shown in books or other writings: evidence of character too is very important. They cannot, doubtless, always have evidence of this kind with regard to new candidates: but I am inclined to think that the more exacting they show themselves in requiring it, the better on the average will be the quality of their governors.

§ 3. For the reasons given in the preceding section, I do not think it expedient that there should be any regular and direct intervention of the people in ordinary legislation, or—*a fortiori*—in the administrative work of the central government. The considerations above urged undoubtedly apply less strongly to local government, as the matters with which this deals fall more within the range of the experience of ordinary citizens. But even here it seems to me that the normal action of the latter is likely to do most good with least harm, if it is confined to criticism and periodical

appointment of the persons primarily responsible for governmental decisions: though the duration of office may with advantage be shortened in the case of local government, so that the indirect control of the governed may be closer and more sustained.

There are, however, cases in which the advantages of the direct legislative intervention of the citizens at large appear to me to outweigh the drawbacks. The first case arises when in a legislature constructed on the two-chamber system it is important to avoid the deadlock resulting from a disagreement between the two chambers. This is, as we have seen, especially important in the ordinary kind of Parliamentary Government:[1] and, as a method of terminating the disagreement, a reference to the citizens at large has many advantages. The dignity of the senate is saved if it has to yield to the people and not to the rival chamber; by the reference of a particular measure to the judgment of the citizens a more clear expression of the people's will is obtained than a general election of representatives can give; the process is more educative, since a single definite issue is placed before the country; it also avoids the danger involved in the representative system, that an interested or fanatical minority of citizens may, by concentrating its whole voting power at a general election on a particular question, obtain a fictitious majority of representatives pledged to support its demands. In the case of such a reference to the people as this, in the course of ordinary legislation, a simple majority of those voting would naturally be decisive.

But, in my opinion, the most widely important case, in which the direct exercise of governmental functions by the citizens at large is desirable in modern civilised states, is when changes are proposed in constitutional rules designed

[1] Even where the Supreme Executive is not dismissible by Parliament, and consequently the disagreement of two co-ordinate chambers causes less inconvenience, it would be sometimes advantageous to have a means of terminating a conflict between the chambers by a "referendum"; *i.e.* in cases where the need of some legislation on a particular point is urgent and generally recognised, but the chambers cannot agree upon the precise form that the legislation is to take.

to have greater stability than ordinary laws. A modern civilised state—we may now assume—will be normally a constitutional state, in which all the organs of government carry on their work under certain fundamental laws, which at once assign and limit their powers. We may assume that such laws should be somehow legally alterable: it is *primâ facie* reasonable that it should be beyond the power of the ordinary legislature to change them; and it is obviously desirable that so long as they exist they should have the support of popular acceptance. If so, there seems to be no way so effective to secure the desired stability and popularity at once, as to place them formally under the guardianship of the people at large. This may, no doubt, be done indirectly, according to the method adopted in several European constitutions, by requiring any change in the constitution to be approved by two successive legislatures, so that a general election may always intervene between the proposal of the change and its final adoption. But, as I hold it undesirable that legislators should be elected solely on account of their opinions on one particular question, I think it better that, where the assent of the people at large is required for the validity of any legislative change, this assent should be sought and given in a direct and simple form.

I pass, therefore, to consider (1) whether it is really expedient to give special stability to a certain portion of the law of the state; and (2) if so, on what principles the portion thus rendered exceptionally stable should be determined.

§ 4. I may begin by observing that the terms "constitution," "constitutional," are ambiguous; they may either signify "rules relating to the structure of government and the distribution of powers among its parts," or, "rules not alterable by the ordinary process of legislation." To avoid the confusion that the double meaning might cause, I shall here use the term "structure" for "constitution" in the former sense. It is obvious that a "constitution," in the latter sense, may include rules that do not relate to the structure of government, but merely restrain or prescribe its action. On the

other hand, while every state must have some governmental structure—since there must be some rules, expressed or implied, determining the appointment and powers of the organs of government—still, the process of changing such structural rules may be simply that of ordinary legislation, as it is in England. In this case we may say that the structure of government is Flexible: while, if it cannot be altered by the ordinary process of legislation, we may call it more or less Rigid, according to the difficulty of the process of change.

The grave and—I think—decisive disadvantage of flexibility lies in the ease with which fundamental changes may be made; so that valuable rules and institutions may be abolished in a transient gust of unpopularity, and thus lose irreparably the stability given by antiquity and unbroken custom. The corresponding drawbacks of rigidity are partly that clearly expedient changes are prevented, partly that, by making change more difficult, the danger of violent revolution is increased. These drawbacks perhaps render it dangerous to require for a constitutional change a preponderance of votes so great that a majority, large enough to be plausibly described as "the nation," is still constitutionally unable to change its fundamental laws. But this objection could hardly be serious if the approval of no more than an absolute majority of the electorate were required for the validity of constitutional changes,—since a restraining rule can hardly be felt as an intolerable burden by citizens who will not take the trouble to walk to the polling-places in order to get rid of it; at the same time this requirement is likely to be an important barrier against hasty changes. Perhaps a constitution protected by this barrier—and by the requirement of a similar majority in at least one of the chambers of the central legislature,[1] before any change could be pro-

[1] In a two-chambered legislature, in which the members of both chambers are appointed by periodical election, an absolute majority in each of the two chambers might reasonably be required to concur in bringing forward any change in the constitution. But to allow a non-elective senate permanently to obstruct constitutional change, would obviously not be consistent with the popular basis here advocated for the constitution. The refusal of

posed—would have as high a degree of stability as it is desirable to aim at in a unitary state.[1]

There are, however, certain further disadvantages attaching to a rigid constitution which require careful consideration. Firstly, when changes are proposed, the attention of statesmen and of the public, which should be concentrated on the difficult task of weighing considerations of expediency for and against the change, is liable to be inconveniently distracted by the question of its legality; secondly, it is hard to find a satisfactory authority for deciding this latter question. The former disadvantage is to some extent inevitable; but in order to minimise it, minute and complicated constitutional restraints should be avoided as far as possible. The difficulty of finding an unexceptionable organ for deciding disputed questions of constitutional interpretation may be met in various ways; none of which, however, is free from objection.[2]

*Primâ facie*, this interpretative function belongs to the judiciary; at the same time, an arrangement by which the judiciary has to sit in judgment on the legislature involves certain difficulties and disadvantages. In the first place, in the ordinary administration of justice, the function of the judge comes into play when a breach of law re-

consent by such a senate should therefore only have the effect of delaying for a time a change supported by an absolute majority of the house of representatives; and any power of veto vested in the supreme executive should be similarly limited.

[1] For the reason why a federal constitution is naturally more stable, see chap. xxvi. § 4.

[2] It is to be observed that this difficulty may conceivably arise even when the structure of government is flexible; since any structural rules, limiting the powers of governmental organs, may lead to disputes as to the power of one or other organ, even though such rules are as alterable as ordinary laws; and it may not be possible to settle such disputes by new legislation, if ordinary legislation requires the agreement of several differently appointed bodies or individuals. Especially where the Executive is not dismissible by Parliament, and has a veto on new legislation, it is not unlikely to disagree with the legislature as to the exact limits of its powers under the existing law. In such a case the question must arise who is to settle the point at issue; and it will be a disadvantage if the constitution—whether fixed by precedent or by statute—does not clearly assign, either to the ordinary judiciary or to some other body, the function of decisively interpreting its rules.

quiring reparation or punishment is alleged to have been committed; but if an act is passed by the legislature in excess of its constitutional powers, it is hard that an ordinary citizen should suffer either for obeying or for disobeying it. To prevent this, an authoritative decision on the validity of the act might be obtained from a judicial tribunal before it was finally passed; but this arrangement is open to the objection that such a decision is less likely to be right than one arrived at in the ordinary way of litigation, after the court has heard the arguments of professional advocates on both sides. Perhaps it would be, on the whole, best that a short interval should be allowed in which objections might be taken to the constitutionality of any new law passed by the legislature, and that if they were taken the law should not come into operation until the points raised had been argued before and decided by a tribunal. Where no such objections were taken the decision of some high judicial organ without litigation—perhaps the Law Council before suggested—should be final.

But the plan of making the ordinary judges interpreters of the constitution is open to more fundamental objections. Since it confers on the judges a final and supreme power of practically determining the law, wherever the constitution is ambiguous and a majority sufficient to change it unattainable, it introduces a danger that the judges may be drawn into party conflict, and the confidence in their impartiality thereby be impaired. And from the same cause there arises a further danger that the legislature or the executive may be tempted to misuse its control over the appointment and dismissal of judges, in order to obtain a tribunal subservient to its wishes; while yet the withdrawal of all control of this kind would leave the judges in too independent a position.

On the other hand, if, to avoid these difficulties, we leave the interpretation of constitutional rules to the ordinary supreme legislature,[1] we can hardly expect an impartial

[1] This objection obviously applies still more strongly to the central legislature in a federal state.

decision in any dispute as to the limits of constitutional restraints imposed on legislation. If, therefore, in the case of any legislation that excites strong opposition, the charge of transgressing constitutional limits is urged against the parliamentary majority by their opponents, it is likely to be a permanent source of resentment, and seriously to aggravate any discontent that the disputed legislation may cause on other than constitutional grounds.

(I may notice a simpler method of avoiding the evils of a conflict among the organs of government,—viz. by depriving all constitutional rules of strictly legal force as against the supreme executive, and making it the duty of the judges to regard its commands as valid in the last resort: since this is an interpretation of "Constitutional Monarchy" still surviving in Germany. It might doubtless sometimes enable the monarch to meet a dangerous crisis successfully, by a salutary extension of executive power which would otherwise be illegal and disorderly. But this advantage appears to me too dearly purchased by a sacrifice of the normal relation between the legislature and the executive.)

Another possible method would be to refer to the citizens at large any question of legislative change of which the legality is disputed by a sufficiently large minority in the legislature. This plan, however, is open to the objection that the citizens at large are obviously not qualified to decide disputed points of interpretation: and it is liable to make the constitutional rules practically more elastic than they were designed to be, if the assent of a mere majority of those voting is sufficient, and more stringent than they were designed to be, if it is not sufficient.

On the whole, I am inclined to prefer the judicial method, with the modifications above suggested, in a unitary no less than in a federal state; though the disadvantages of it appear to me to constitute a strong reason for reducing to a minimum the restraints on legislation which it is thus left to the judiciary to interpret and apply.

In any case, changes in the constitution should be

*initiated* by the ordinary central legislature[1]: to allow them to be initiated outside it would, I think, tend to diminish its responsibility and influence, and withdraw a security against hasty change without any corresponding advantage. At the same time, when extensive changes are desired, there is some advantage in calling a special convention to consider the details of such changes: as there may be persons recognised as peculiarly qualified for this important work who are not members of the ordinary legislature.

§ 5. Let us now consider generally the kinds of constitutional rules that it is expedient to render unalterable by the ordinary legislature if a rigid constitution be adopted.

We may distinguish five classes of such rules:—

(1) Rules determining the mode of appointment and dismissal of the persons composing the different organs of government, or determining the distribution of functions among them. Of such rules the discussion in the preceding chapters will have already afforded abundant examples. *E.g.* the constitution of the legislature as one-chambered or two-chambered; the conditions of tenure of the office of legislator in either chamber; the duration of Parliament; the definition of the electorate, and the principles of its division into constituencies; the mode of appointing (and, if dismissible, of dismissing) the Supreme Executive; regulations for securing adequate independence in the judiciary;—these will all be naturally and properly determined to some extent in a rigid constitution, so as to be unalterable by ordinary legislation. And, of course, in a federal state the division of powers between central and local governments must be so determined.

(2) Rules determining the form of procedure of any organ of government; as, *e.g.*, that no legislative proposal be passed by either chamber, until after it has been considered a certain number of times; or that no one be arrested as a suspected criminal except on a definite charge communicated to him.

[1] See note to page 536.

(3) Rules limiting the means to be used by any organ of government for attaining (subordinate) ends admitted to be legitimate: *e.g.* rules prohibiting "ex post facto" legislation, or legislation that takes private property without compensation, or impairs the obligation of a contract; rules prohibiting "unreasonable searches of houses" by the executive, or the opening of letters in the post-office, or the detention in prison of persons before trial, unless accused of certain grave offences; rules prohibiting judges from charging juries, or receiving fees for their own use.

(4) Rules limiting more broadly the sphere of governmental interference; *e.g.* rules prohibiting interference with religious belief or worship, or civil or political disqualifications on the score of race or sex. More rare are

(5) Rules determining positively the mutual rights and duties of citizens other than the members or servants of government.[1]

In all these cases the ground of the constitutional restriction may be either the protection of citizens generally against oppressive governmental interference by any organ, or protection against misconduct of legislators as individuals, or other reasons of general expediency.

I think, however, that the inconveniences and dangers arising from such constitutional restraints outweigh the arguments in their favour—unless (1) the points determined are of a very simple and fundamental character, or unless (2) there are special reasons for regarding the ordinary legislature as liable to be biassed in a direction opposed to the interests of the community.

We may distinguish four cases in which such reasons appear to exist.

[1] Rules of this last kind are found in many of the State Constitutions of the United States. We find there "minute provisions regarding the management and liabilities of corporations, . . . we find a declaration of the extent of a mechanic's lien for work done; we even find provisions for fixing the rates which may be charged for the storage of corn in warehouses."—Bryce, *American Commonwealth*, Part II., chap. xxxvii.

Firstly, it may be possible by constitutional rules to counteract to some extent the tendency of legislators to sacrifice the public interest to their interests as individuals. For instance, they are under some temptation to vote themselves pay or privileges which it is not for the good of the community that they should have: this danger, then, may be met either by fixing in the constitution the emoluments, if any, and the personal privileges of members of parliament; or—less rigidly—by providing that no legislation increasing the emoluments or privileges of members of parliament should affect the legislators who pass it until after they have been re-elected.

Secondly, in any form of polity except where the supremacy of Parliament is intended to be practically complete and undisputed, there is a danger that the *esprit de corps* of the legislature may prompt to encroachments impairing the qualified independence of the other organs, unless this independence be protected by constitutional securities. This class of rules has been sufficiently illustrated in previous chapters (xxii. and xxiv.).

Thirdly, a dominant party in Parliament may be tempted to tamper with its elective basis, in order to gain a party advantage. For this reason I conceive that the maximum duration of Parliament, the general principles on which the electorate is divided into separate constituencies, and other important points in the arrangements for electing legislators, should, in a rigid constitution, be placed beyond the control of the ordinary legislature. For a similar reason, it may be desirable to limit the power of any legislative assembly to determine its own rules of ordinary procedure and inflict penalties for the breach of them, in case experience shows that this power is practically liable to be exercised oppressively towards minorities.

Fourthly, the legislature, acting *bonâ fide* for what a majority of its members believe to be the good of the community, is likely to have from time to time so keen a desire for the attainment of particular governmental ends by legislation as to be tempted to underestimate the comparative

importance of protecting the freedom of individuals from oppressive governmental interference; and may thus be led to abrogate or suspend, without sufficient cause, rules and institutions designed to protect this freedom.

§ 6. This last consideration has been the chief ground for many important structural rules in modern constitutions, such as the rule securing trial by jury in criminal cases; and it is, I think, by far the most important argument for maintaining constitutional rules other than those relating to the structure of government. It should, however, be observed that it is often a matter of considerable difficulty to frame such rules with sufficient precision to make them legally effective, without at the same time hampering the legislature unduly. Hence, in many cases the declarations of "fundamental rights of citizens," that have been included in modern constitutions, would seem from their vagueness to be chiefly designed to produce a moral effect; so far as they impose legal restraints, these seem to be often hardly more than formal. Thus the prohibition of "ex post facto legislation" will prevent the avowed infliction of penalties for mischievous acts that were not legally prohibited when they were done; but it will not legally—though it may morally—restrain a legislature from inflicting damages on the persons who did the acts, so long as it is not inflicted avowedly as a penalty. So again, the rule "that private property is not to be taken for public use without just compensation" would not legally restrain a legislature from giving inadequate compensation,—owing to the vagueness of the term "just."

I may conveniently illustrate the difficulty just mentioned by considering more particularly the fundamental rules securing freedom of speech and of the press, which find a place in most modern constitutions in which "fundamental rights" are enumerated: since such rules have a special importance when we are considering the general relation of the governed to the government as a whole.

We have seen that the control over government given to the governed by periodical elections is likely to be com-

paratively ineffective and ill-directed, unless the danger of blindness or apathy on the part of the governed be met by full and free criticism of current legislation and administration. At the same time, such criticism is likely to be often very distasteful to the governmental organs criticised, even when it is highly useful: hence there is a *primâ facie* reason for including in any rigid constitution rules protecting the citizen's right "to speak the thing he will" from undue governmental interference. But with a view to the maintenance of order, it seems important that this protection should only be given to criticism that (1) is *bonâ fide* intended to recommend only legal methods for obtaining the reform of what is criticised, and (2) would not be understood as an incitement to illegality by a person of ordinary intelligence. And in applying this maxim due regard must be had to cases where agitation is undoubtedly on foot tending to cause attempts to overthrow or resist government by violence; since it is obviously possible for speakers and writers in such circumstances to fan the flames of sedition dangerously, by utterances which are kept carefully free from any recommendations to illegality. We before observed that expressions of opinion which would not ordinarily be incitements to violations of private rights may become so through the special circumstances attending their utterance; and the same is obviously true of offences against government. Hence any constitutional rule restraining the legislature from "abridging freedom of speech or of the press" will require to be qualified by a tolerably comprehensive permission to prohibit seditious utterances.

So again: it is an important practical security for freedom of political utterance that man shall not be prevented from writing and publishing what he likes, by any interference, before the act, of an executive official,—but only restrained by the dread of punishment judicially inflicted after publication. It is, indeed, indispensable to maintain this security, if we are to get the advantage of free criticism of the acts of the executive: since the question whether such criticism has kept within the legal limits laid down for

it is too delicate a one to be left to the judgment of the persons criticised. But it does not follow that there should be no special press law: and it would be highly undesirable that such a law should be constitutionally prohibited. The power and the inducements that an unscrupulous editor of a newspaper has to disseminate calumnies about public officials —or even private persons in any way important—constitutes a grave danger, against which it is desirable to take special precautions. Thus (*e.g.*), to facilitate the infliction of deserved punishment the names of printer and publisher should be affixed to published documents: to facilitate reparation it is not unreasonable to require every newspaper to be registered, and to require the person registering to deposit securities to a certain amount in the hands of a public official, to serve as a fund from which damages and costs may be paid in the case of an action for libel: to diminish the danger of libels without imposing the necessity of legal proceedings, it seems a good rule that newspapers should be compelled to publish gratis a reply from any person whom they have attacked, provided such reply does not exceed the attack in length or in violence of language.

So far I have been treating the relation between government and the governed, considered as individuals. The constitutional rights of "free speech" and "free press" have been historically associated with those of free meeting and free association. But the consideration of these latter belongs to the general question how far any special need of governmental interference arises in consequence of the combination of individuals for purposes not demonstrably unlawful; whether they combine transiently in public meetings, or in leagues for some special end, to last till their end be achieved, or in associations designed to be permanent. This question appears to me sufficiently important to be reserved for a separate chapter.

## CHAPTER XXVIII

### THE RELATION OF THE STATE TO VOLUNTARY ASSOCIATIONS

§ 1. In the first chapter it was noticed that Government, in the sense in which we have been concerned with it in this work,—the Government whose existence is the essential characteristic of political societies as such—is only one species of "government" in a wider sense; and that human beings, especially in modern states, are drawn together, by important relations other than political, into associations which have a kind of government. The most venerable of these—and the only associations that have had a continuous life rivalling that of states in duration and in importance to their members—have as their bond of union religious belief and worship. But there are various other associations, mostly with narrower and more temporary aims, which are of some importance in the social life of modern states: political parties and leagues; industrial associations, such as trade-unions of workmen, federations of employers, joint-stock companies of capitalists; scientific, literary, and philanthropic societies of various kinds.

Any such association of persons for the realisation of common aims will ordinarily have a kind of government, the structure of which will often resemble more or less closely that of the political government which we have been contemplating. In the most ordinary type of such an association—if recently formed—the ultimate control is vested in the general assembly of the associates, whose assent is required to a change in the fundamental rules: but most

of the detailed regulations are left to an elected council, with perhaps an executive committee, and, in any case, executive officials, appointed to carry on the work of the association in accordance with the rules.[1] Not unfrequently such associations take a federal form, and have branches in different districts, with a division of functions between central and local organs of management. If penalties are found necessary for breach of rules—as is sometimes the case—some quasi-judicial machinery is framed for determining whether such penalties have been incurred; so that all the fundamental functions of government are brought into exercise.

The general distinction between the "quasi-government" (if I may so call it) of such associations—when neither aided nor repressed by the state—and the government with which we are concerned as students of politics, is, that the former, in an orderly community, can inflict no penalty worse than exclusion from the benefits of the association, and perhaps from voluntary relations with its members. Any individual who withdraws from the association and is content to have nothing to do with its members can suffer no further penalty,—except that, if by withdrawal he commits a breach of contract from which the association suffers damage, he may be compelled to make adequate reparation, just as if he had broken any other contract. Of course if the government of the state confers special powers on the government of the association, the penalties that the latter can inflict on its own members or on other persons may be correspondingly extended. For instance, a voluntary association of persons instructed in medicine may, without any special authorisation, confer—and if necessary withdraw—certificates of qualification for the profession of medicine: but it is only in virtue of special powers conferred on the association by the government of the state that an uncertificated practitioner can be placed in a position legally

[1] It is noteworthy that in the case of the religious association that is most widely extended and powerful in the countries sharing West-European civilisation—the Catholic Church (commonly so called)—a strictly monarchical form of government survives from earlier, though not the earliest, ages.

inferior to that of the holder of such a certificate. Powers of this kind may be sometimes conferred with advantage where the association in question has the confidence of the public, so that the repression of quackery effected by the exercise of such powers is less invidious than if it were carried out directly by Government, and practically no less useful. Similarly, other minor fragments—if I may so say —of governmental power are sometimes conferred on voluntary associations whose work is of social importance: thus, a banking company may have the privilege of issuing notes having legal currency; and a railway company may have the power of making bye-laws for the regulation of its traffic, the breach of which entails penalties enforced by the ordinary tribunals of the State. Usually the associations thus privileged are in return subjected to special governmental regulation. In this way the associations become —as I have before said—semi-public: and the "quasi-governmental" powers of the bodies that manage their affairs become to a certain extent "semi-governmental"—in the sense in which the term "government" is used in this treatise.

§ 2. But, as I have before observed, it is only to a very minor extent that this devolution of governmental powers on voluntary associations is likely to be expedient. More important questions arise when we consider the possibility of conflict between the government of the great coercive association which we call the State, and the government or "quasi-government" of one of these voluntary associations,—either within the State, or possibly extending across political boundaries and including elements belonging to several states. At first sight the right method of dealing with such conflict may seem to be simple: since —it may be said—if the associates break the law they may be punished as individuals, and if they do not there can be no ground for interfering with the association. But firstly, the danger of obstinate and systematic disobedience to Government is materially increased by the formation of organised associations, through the consciousness of strength

derived from numbers,—perhaps also from wealth—and from the habit of concerted and combined action. And secondly, there are certain kinds of acts unsuitable for legal repression when done by individuals without concert, which become both more gravely and more palpably mischievous when carried out by the organised co-operation of a large group of persons.

The first argument applies especially—though by no means solely—to political leagues or associations that, seeking to effect some particular change in the structure or regular action of Government, tend in consequence to be permanently in opposition to the actual governing organs. So long as such combinations confine themselves to the work of influencing opinion by argument, they are a useful—perhaps almost indispensable—means of educating the electorate for the performance of their constitutional duties.[1] But if the conflict in which they are normally engaged with existing political arrangements should become bitter and exasperated, the consciousness of strength derived from the organised concert of numbers constitutes a special temptation to deviate into illegality. The ease with which the government of a civilised state is able, under ordinary circumstances, to secure obedience to its commands—in spite of strong and widespread aversion that may from time to time be aroused among sections of the governed—is largely due to its manifest and overwhelming superiority in force, as compared with any individual, or any scattered number of individuals acting without concert: hence the greater the force that any recalcitrant element can count on exerting if it defies the government, the greater the danger of disastrous conflict. This

[1] The influence of orderly political associations or "parties" on the normal working of representative or popular Government is so important that I propose to discuss it separately in the next chapter.

It should be observed that, if any part of the structure of Government is constitutionally unchangeable, an association that aimed at changing it would be *primâ facie* illegitimate: but I do not think that it should be necessarily treated as such, if it repudiates violent methods. As I consider the provision of absolute immutability in a constitution irrational, I think it safer to interpret it loosely in practice.

is not a decisive argument for discouraging such associations, since increased possibility of resistance to Government may be also a protection against tyranny. But it constitutes an adequate ground for special repressive intervention, if it becomes manifest that the ultimate design of a political association is to use unlawful violence for the attainment of its ends; or if, even though it formally repudiates unlawful methods, its operations have a manifest and persistent tendency to cause such violence. Under these circumstances it is in harmony with the principle on which "indirectly individualistic" interference has before[1] been justified, that the whole corporate action of such an association shall be prohibited and suppressed, even though a part of its operations may be perfectly lawful;[2] but the measure should only be adopted in extreme cases, since it involves the danger that the prohibited society may continue to operate secretly, and that its operations may thereby become more demoralising though less mischievous in extent.

Similar reasoning is applicable to the case of still more transient combinations of men in political meetings of a numerous character. Here the consciousness of strength due to combination is not generally likely to prompt to overt opposition to Government, without the additional influence of inflammatory rhetoric; but a crowd under this influence may constitute a serious danger to order: hence, where there is reasonable ground—capable of being judicially proved—to fear wrongful violence in consequence of the meeting, it seems expedient that the meeting itself should be treated as unlawful, whether such acts fall within the design of the promoters or not; and persons taking part in it should

[1] See chap. ix.

[2] It will often tend to minimise the required interference if the suppression be not performed once for all by the legislature, but from time to time, so far as may be required, by the executive, temporarily invested with special powers. Such powers, if they are to be useful at all, should be somewhat wide; or else the attempted repression may be evaded by the reconstitution of the dangerous association under a new name: but the use of these wide powers should be carefully watched by the legislature.

be liable to penalties, if it can be shown that they had means of knowing its unlawfulness. And, if experience, at a particular place and time, shows that the tendency of a certain kind of meeting to cause crime is sufficient to constitute a serious danger, it is not beyond the scope of "indirectly individualistic" interference that the Executive Government should have the right of preventing the evil: either by prohibiting it altogether, or by sending an official to watch the proceedings and close the meeting if the oratory becomes dangerous. It seems, therefore, inexpedient to restrain the legislature absolutely, by a constitutional rule, from conferring on the executive powers to prohibit or close public meetings: but as there is an obvious risk that such powers may be abused, it is important that they should only be conferred (or in case of urgency temporarily assumed) on special grounds, and exercised under careful limitations.[1]

§ 3. The other important ground for interference with associations was incidentally noticed in a previous chapter (iv.) in speaking of "moral coercion." We there observed that acts which would not merit legal repression apart from their coercive purpose, may become mischievous encroachments on freedom if they are threatened and done by A with a view to induce B to act contrary to his interests and inclinations. To a great extent, however, this kind of mischief, so far as it is caused by individuals acting independently, must be left to be repressed by public opinion; partly on account of the general difficulty of proving an act to be criminal, when the criminality lies solely in the coercive design with which effects, in themselves legitimate, are produced. But where this kind of coercion is threatened and carried out by an association, it becomes generally easier to prove the coercive intention from the mutual discussion and arrangement which such combined action necessarily involves: while at the same time the increase of power, which association tends to give, increases the danger of oppression and the need of

[1] As to the manner in which such limitations should be enforced, see chapter xxiv. §§ 8 and 9.

Governmental interference to protect the freedom of the persons threatened.

Attention has been recently called to this point by the appearance in Ireland, and subsequently in the United States, of "boycotting," or concerted refusal to have commercial dealings with certain individuals, whom the boycotters wish to coerce into some action which the persons coerced regard as contrary to their interests. A comparison of this practice with the ordinary operation of trades-unions in England, for the purpose of raising or maintaining wages, will illustrate the different degrees in which coercive intention may enter into concerted action for the promotion of the interests of the persons who act in concert.

When a trade-union of labourers fixes the terms on which the labour of its members is to be purchased, and threatens to stop work unless its terms are accepted, it may be said—and in a certain sense truly—that it is trying to coerce the employers of labour into action contrary to their interests: but here the coercion is no more than what is inevitably involved in any sale in which the seller enjoys a partial monopoly and is determined to avail himself of the advantage that this gives him. The aim of the trade-union is merely what individualism assumes to be the aim of every exchanger of commodities,—to sell in the dearest market: and the method adopted for realising the aim has no other element of intimidation than necessarily follows from fixing a price and sticking to it: it is, at any rate, only incidentally coercive. But if the combination is extended to include another set of labourers, who pledge themselves not to purchase the products sold by the employers of the first set, or not to work for any employers who purchase such products,—then the concerted action of the whole combination may be said to be essentially coercive, since its tendency to promote the interests of the persons adopting it depends on the annoyance it causes to the persons on whom it inflicts loss.

I think that the distinction is important, and indicates the point at which the repressive action, either of law or

of public opinion, is required: at the same time, I think that it is extremely difficult to lay down a legal rule that will effectively prevent the mischief in question, without imposing severe and dangerous restraints on the freedom of industrial intercourse.

Firstly, in matters of buying and selling it is difficult, without injustice to the poor, to place any restrictions on the action of an association which are not placed on the action of individuals: since in such matters the coercive force capable of being exercised by an association is for most purposes not more than equivalent to that of a single individual whose wealth is equal to the aggregate wealth of the association. Combination is, in fact, the only way by which the poor can place themselves on a par with the rich in bargaining. Now, we can hardly lay down as a general rule that individuals are not to be influenced in buying by considerations other than the quality of the article purchased, and the labour spent in purchasing it; or in selling by considerations other than the price: and yet, if such other considerations are admitted, it seems hardly possible to exclude conditions that are designed to have a coercive effect. Thus a man must be generally [1] allowed to exchange with A rather than B, for the sake of consanguinity, or friendship, or because A promotes his convenience in other ways, or because B is surly and ill-mannered: but if so, he cannot be prevented from using the exchange as a means of coercing B to conform to his wishes in other matters besides the exchange. He must be generally allowed to prefer an employer who employs his friends: can he be legally prevented from refusing to work for an employer who employs his enemies? He must be generally allowed to sell on unremunerative terms in order to draw business away from

[1] I do not mean to say that, under special circumstances, it may not be possible and expedient to place certain traders under the legal obligation of dealing similarly with all customers, without regard to any considerations other than the quality of the commodity that the customer offers in exchange. I think that this kind of interference may, in certain cases, prevent more harm than it causes. But it would hamper trade intolerably to make it general.

his rivals: can he be prevented from doing this in order to force a rival out of the trade? And if such prevention is impossible in the case of an individual, it will be difficult to make it equitable, even if it be possible, in the case of an association,—for the economic reason above stated.

Further, in attempting to repress mischievous moral coercion, there is a danger of preventing moral coercion of a kind useful to society. For instance, it is *primâ facie* to the advantage of society that a physician should refuse to consult with one whom he considers a quack: he is hardly likely to do this unless he is supported by a preponderance of medical opinion: and though the preponderance of medical opinion may err, there is no general presumption that Government will be qualified to correct its errors. Similarly, it is *primâ facie* to the advantage of society that any skilled workers should refuse to work with those who use bad methods: and though in some cases the criterion of "badness" applied may be the interest of the class where this diverges from the interest of the community, it does not seem generally advantageous that Government should intervene to determine what methods are admissible. Again, it is difficult to say that an employer may not refuse to employ workmen of whose character he disapproves—even if they are efficient workmen—or to require him to prove to the satisfaction of a tribunal that his disapproval is well grounded: and if so, a workman can hardly be prevented from refusing to work for an employer, or with other workmen, whose conduct he disapproves. In short, in these and similar cases, it is difficult to interfere without hampering the natural operation of the moral or social sanction, whose indispensability as a supplement to the legal sanction has been pointed out in a previous chapter (xiii.). Nor does it seem reasonable to lay down that the operation of the social sanction is only salutary when it is due to the spontaneous and unconcerted action of individuals, and that it becomes dangerous to freedom when it is the result of concert; since exclusion from social relations, as an expression of moral disapprobation, is generally likely to be more

judicious if performed after consultation and with knowledge of the intentions of others. I admit, however, that a new danger to freedom is introduced if concert in such action is the result of pressure:—*i.e.* if among the persons who combine to exclude others from voluntary social relations, there are some who are only induced to combine by the fear of being similarly excluded if they refuse. I think that this moral coercion to coerce—"coercion in the second degree"—is usually mischievous: but it is difficult to say that it is so always: it is difficult to say that there is no vice so dangerous and contagious as to justify a concerted refusal to associate with the associates of those who practise it. And it could hardly be expedient to require judicial proof of the presence of such vice in order to justify this concerted exclusion: since it is often in cases where such judicial proof is difficult that the social sanction is especially needed to supplement the deficiencies of the legal sanction.

On the whole, therefore, while admitting that the social sanction may easily be misapplied in such cases, I should generally prefer to leave it to the moral opinion of other sections of the community to censure and repress the misapplication. I conclude, therefore, that the moral coercion exercised both by individuals and by associations, so far as it is effected by acts legitimate apart from their coercive intent, should not generally be made a legal offence, if the mischief it causes can be kept within tolerable limits by any other means: though any intimidation by committing or threatening acts of physical violence or other violation of ordinary rights—including breaches of contract—should be repressed with as much severity as may be required.

Even where an industrial combination cannot reasonably be attacked as an encroachment on the freedom of outsiders, or otherwise oppressive to individuals, it may still be opposed in the interest of the community as a whole, through the establishment of a monopoly,—total or partial. We have already seen that the theoretical demonstration of the tendency

of industrial freedom to promote the most economic production of social utility fails in the case of monopoly: in fact, the most deep-seated weakness and most formidable danger of Individualism lies in the indefinite possibility—which it cannot but admit—that the "free competition" on which it relies may by "free combination" be turned into its economic opposite, Monopoly. But here, again, it does not seem desirable—unless under very exceptional circumstances—to meet the danger by direct repression: since any attempt to fix legal limits to the extent to which traders may profit by the intensity of demand for their commodity, and the limitation of its supply, would involve too extensive interference with freedom of exchange. If, however, any department of production shows an irresistible tendency to fall under the conditions of monopoly, Government may sometimes advantageously intervene in the way of industrial competition—supposing the business to be such as may efficiently be carried on by or under the control of Government. Also, where commercial associations—such as railways, water companies, etc.—require special powers of compulsory purchase, Government may, in return for the grant of such powers, impose conditions which may prevent any resulting monopoly from being used to the disadvantage of the community.

So far I have been speaking of combinations of which the aim is to promote the economic interests of the combiners. It is, of course, possible that combinations for other ends—political or non-political—may attempt to gain their ends by injuring or intimidating opponents through exclusion, or threat of exclusion, from economic relations: but this method is likely to be dangerous to those who use it in a civilised community, so far as such an association mainly depends for its force on agreement in opinion and sentiment; since it will ordinarily be liable to lose more by alienating all who respect intellectual independence than it can gain by moral coercion. It is, I think, more likely that economic or social pressure, severely felt by those on whom it falls, may incidentally result from the natural exclusiveness of a group of persons bound together by strong community of

sentiment springing from community of beliefs on matters of vital moment.

§ 4. This leads us to the question that has historically been the most important of those that arise under the present head,—as to the relation which the government of the State should take up towards religious associations. If we approach this question from the point of view of the State, as we naturally do in the present connection, two divergent methods of treatment at once suggest themselves. We may start with assuming the existence of voluntary religious associations, and consider how the State should proceed to maximise the advantages derivable from them and minimise the dangers that they involve: or we may start with the existence of religious associations as problematical, and consider whether the social needs that they supply are needs which it is in any case the business of Government to meet somehow, and, if so, how they should be met. The former of these points of view is most natural to a European student of Politics: at the same time, in a theoretical discussion of the subject, it seemed best to begin with the latter; which I accordingly adopted in a previous chapter (xiii. § 5), in which I considered how far it is the business of Government to provide efficient instruction in morality. In the present chapter I shall adopt the other point of view; I shall assume the existence of the historic religious associations called Churches, with the character that they actually have in the communities that share West-European civilisation, and shall consider what relations the State should endeavour to maintain with them. I may begin by stating the following conclusions, to which the previous discussion seemed clearly to lead.

Firstly, the Christian churches meet a social need of fundamental importance, which it would be desirable for Government to supply if it could do so effectually; while yet there are decisive objections to any governmental organisation for this purpose. With a view, therefore, to the systematic teaching of morality, it is a gain to the State that the action of the churches should be vigorous and effective,

so far as it is in harmony with the social and political order which it is the aim of Government to maintain.

Secondly, so far as this harmony exists, the churches are likely to fulfil their function better if kept independent of the State. For, if the clergy acquire the character of officials appointed and paid by the State, they become exposed in some degree to the objections before stated against a governmental organisation for teaching morality: and are therefore likely to be less effective in rendering the service for which the State appoints and pays them.

It remains to consider whether there is adequate ground for governmental interference with a church—or any other association that offers men moral instruction and guidance,—on account of the danger of conflict between the conception of social order advocated by the Church, and that which Government aims at maintaining. If the collision takes the open and palpable form of incitements to resist or disobey the laws or legal commands of Government, it must of course be repressed: but it is a more doubtful question whether the general danger of disobedience promoted by the rulers or leaders of the Church — or of mischievous exclusion or intimidation, difficult to repress by legal penalties—is an adequate justification of a permanent interference of Government with a view to avert the danger.

The right answer to this question must, I think, depend very much on the size of the religious association in question and the character of its organisation. The risk of collision is obviously less—as Adam Smith pointed out—where there are a number of small religious bodies than it is where one decidedly preponderates. It is less where private judgment is encouraged—as in Protestant sects—than it is where obedience of laity to clergy, and of clergy to their ecclesiastical rulers, is strongly inculcated. It is seriously intensified and complicated when the Church is not confined within the limits of one State, supposing the habit of obedience to ecclesiastical rulers to be strong; since, in this case, there will be a body of persons within the State who may at any time be bound by their ideas of religious

duty to obey the orders of foreigners. It should be added that there is hardly any question on which the traditional habits and sentiments which a community derives from its previous history are more important considerations in determining the proper course of action for a statesman, than they are on the question of interference with religious bodies.

§ 5. Supposing it decided that intervention of some kind is desirable on the ground above stated, the question remains of what kind. Direct prohibition of any religious teaching not clearly immoral in its tendency is invidious and objectionable, as interfering with the free communication of beliefs on which the development and diffusion of knowledge depend; and is likely to be ineffective or worse in the most dangerous cases, from the ease with which opinions and sentiments hostile to government may be secretly propagated among persons united by a community of religious feeling, and the increased virulence that they are likely to assume from the resentment caused by repression.

A better course is for the State to secure a certain control over religious teaching, by the grant of privileges the withdrawal of which would only reduce the Church to the level of other voluntary associations. There are various methods by which this result may be attained. Firstly, apart from pecuniary aid, there are various minor privileges which the State may allow to religious bodies, which would seem to be an obviously reasonable return for the services received from them. It may give special protection to religious meetings from disturbances—whether of a hostile kind, or caused by sellers of refreshment, hawkers, etc., if the meeting is in the open air. It may give to religious beliefs special protection from contumelious treatment—such as is now given by our law of blasphemy (as reduced by modern judicial interpretation), at least to the beliefs which Christians have in common. It may exempt the ministers of specified religious associations from compulsory civil functions, such as serving on juries, and from military functions where military service is compulsory; on the other hand, it may confer on

them certain civil functions which they desire to exercise,—such as the validation of marriage contracts. It may give certain religious associations special opportunities of religious teaching in schools where secular instruction is supported from public funds. In these ways a certain amount of inducement might be given to a Church to avoid as far as possible conflict with Government, without anything like establishment or endowment.

But, secondly, endowment may be given in various minor degrees, without converting the clergy generally into salaried servants of Government. Thus, for instance, immunity from taxation may be granted to the whole or part of the property devoted to religious uses with the approval of the State. Another degree of endowment is by the selection and payment of religious teachers in certain cases in which the State is specially bound to make provision for religious teaching and worship: *i.e.* in the case of persons supported from public funds, such as adults in workhouses and prisons, and soldiers and sailors, and children in pauper and reformatory schools. If this provision be made in such a manner as to avoid proselytism as far as possible, a substantial subvention—which the recipients will hesitate to imperil—may be thus given to one or more religious societies, without the cost entailed by an adequate endowment of religious worship and teaching for the community generally; and without encountering—to any serious extent—the awkward dilemma of either endeavouring to make one set of religious opinions prevail over others held by equally educated persons, or of endeavouring to moralise the community by imparting a number of mutually inconsistent beliefs.

A stronger means of control without anything like establishment may be exercised in the form of a supervision of the wealth of Churches derived from private sources. If, indeed, the expenses of religious teaching and worship are defrayed by contributions from the incomes of its members, it will be difficult for Government to interfere in the employment of such contributions, without measures

of violent and invidious repression: but if they are paid from funds bequeathed to form a permanent endowment for the association, the case is different. Here, in the first place, Government may refuse to admit any religious society to the position of a corporation capable of holding and administering property, unless its organisation fulfils certain conditions, framed with the view of preventing its 'quasi-government' from being oppressive to individual members of the association or dangerous to the State.[1] Secondly, Government may take advantage of a collision to bring the funds of any such society permanently under its control, in pursuance of its general duty of supervising the management of wealth bequeathed to public objects and revising the rules under which it is administered, in the interest of the community at large. And it is to be observed that, apart from any question of overt conflict between Church and State, there are special grounds for the general vigilance and occasional intervention of Government in the case of bequests for religious purposes. Firstly, at the point of death the influence of the priesthood is likely to be especially strong, from the belief that they have exceptional means of predicting—and even, perhaps, of determining—the future happiness and misery of the dying person; while at the same time his personal interest—of a mundane kind—in the employment of his wealth after death is then at its *minimum*. For this reason, it may be necessary to place special restrictions on testation for religious uses, rendering bequests or gifts made under the imminent fear of death liable to be invalidated as such. But further, the bequest of funds to be permanently employed in payment of persons teaching particular doctrines is liable to supply a dangerously strong inducement to the conscious or semi-conscious perpetuation of exploded errors, which, without this support, would gradually disappear: hence it should be the duty of Government to

[1] For instance, in New York, it appears to have been the intention of the legislature—in a general Act for the incorporation of religious societies—to "place the control of the temporal affairs of the religious corporations in the hands of a majority of the corporators, *independent of priest, bishop, presbytery, or synod, or other ecclesiastical judicatory.*"

watch such bequests with special care, and to intervene when necessary, to obviate the danger just indicated, by modifying the rules under which ancient bequests are administered.[1]

[1] This principle is of course applicable to other endowments besides those devoted to religious teaching.

*Note.*—It may be noticed that some interference in the employment of funds for religious purposes may be forced on Government by disputes within the bodies: it may have to determine which of the disputing sections has the real claim to endowments. I observe, however, that the Supreme Court of Illinois decided, in an action for wrongful dismissal, that the "free exercise of religious profession"—which the constitution of Illinois guarantees—is incompatible with the claims of civil courts to decide whether the judgments of the judicial authorities of the Church are in accordance with the laws or Canons of the Church.

## CHAPTER XXIX

### PARTIES AND PARTY GOVERNMENT

§ 1. By parties I mean political combinations, designed for indefinite duration, and having distinctive aims and opinions on some or all of the leading political questions of controversy in the state in which they are formed. It is obvious that such combinations may be connected with illegal acts in various ways, just like the more temporary associations for special political objects discussed in the last chapter, and may require similar repression. Such repression, however, is likely to be difficult and dangerous when it has to be applied to a large and important political party; and party strife that reaches this degree of violence must be regarded as an inflammatory disease of the body politic, for the cure of which no general rules can be laid down,—except that every effort should be made to subdue it by the removal of real grievances, in order to avoid or shorten the application of the repressive method. But political parties have for the student of politics an interest of a different kind, from their tendency, when perfectly legal and orderly in their aims and methods, to modify importantly the normal working of representative institutions; and it is from this point of view that I propose to consider them in the present chapter.

It is difficult to say how far the character and extent of the effects of parties on representative government could have been predicted from a general knowledge of human nature. Certainly nothing like what has actually taken place, in England and the United States, in which the

modern [1] representative system has had the longest trial, seems to have been foreseen by earlier writers who have discussed this system. The authors of the *Federalist* (1788), throughout their careful and minute examination of the probable working of the newly-framed constitution of the United States, never seem to have imagined that the system they were considering would have a predominant tendency to group the citizens into two main parties, competing for victory at all elections: the operation of party is only discussed under the name of "faction" as an evil against which precautions have to be taken; and Madison, when expounding the advantages offered by the new constitution, in reducing the danger of faction, lays stress on the "greater security afforded by the probable greater variety of parties against the event of any one party being able to outnumber and oppress the rest." [2] Even Story, writing in 1833, seems to have no foresight of the party-system by which the constitution of the United States was destined to be worked during the next half-century; for instance, he quotes with emphatic approval, and without any qualifying comment, a summary of the President's duties, in which he is simply directed to "disregard the bias of party" in the appointment of subordinate officials.[3] And even J. S. Mill, writing in 1860, hardly seems to contemplate a dual organisation of parties as a normal feature of representative institutions.

Parties of some sort, indeed, based on agreement in principle or community of interest, or perhaps most frequently on a combination of the two, are generally recognised by English writers, of the last as well as the present century, as an inevitable incident in popular government; and, since Burke, the prevailing tendency of our writers has been to view their operation with tolerant acquiescence, if

[1] Representative assemblies of a certain kind, with various degrees of power, have had a nearly continuous existence from the later middle ages downward, in several European countries. But their nature and conditions, until very recent times, have diverged so widely from the institutions which we have been led to consider, that their experience throws but little light on our present question.

[2] *Federalist*, No. X.

[3] See *Constitution of the United States*, Book III. ch. xxxvii. § 1527.

not positive approval. In order that a proposed scheme of governmental policy, or any important change in the structure of government, desired by a number of persons, may have a fair chance of being carried out, it is obviously expedient that those who are in favour of it should combine for the purpose of compromising their minor differences, and determining jointly the line of action most favourable to the attainment of their common end. The probable number, however, of such combinations, and the range of their objects, could hardly be determined by any general reasoning: but—apart from the effect of periodical elections, of which I shall presently speak—the more natural grouping would seem to be in associations aiming each at a particular set of closely connected political results; some differing but little in the range of their aims from the leagues discussed in the last chapter, others having a wider scope, but still not concerned with the whole business of government. For instance, instead of an "anti-corn-law" league, which would naturally cease when protective duties on corn were abolished, we might expect to have a free-trade league, opposed to all kinds of protection to native industry: then, taking a wider sweep, the persons opposed to interference with trade might naturally join in a more comprehensive union for the maintenance of "natural liberty," and the reduction of legislative interference in all departments to the individualistic minimum. In opposition to this there would naturally be formed a socialistic or semi-socialistic party, who would aim at reducing by the action of government the inequalities and other evils resulting from "unrestricted competition" in any department of industry. But, wide as the scope of these combinations would be, there seems to be no reason why the members of either should necessarily act together on any question of change in the structure of government. There might, therefore, naturally be a third party, distinct from either of the above mentioned, formed to promote measures for increasing the part taken by the people at large in government,—such as short Parliaments, the Referendum, abolition of the Second Chamber, payment of members, etc.;

and another party, again, with the opposite aim of increasing the political power of the highly educated class, by disfranchising illiterate voters, giving more than one vote to educated persons, etc. A fifth party, again, might be formed to promote a pacific and guarded foreign policy; and a sixth in favour of bold enterprise and aggrandisement, with a corresponding increase of taxation for military expenditure. There seems to be no clear general reason why any one of these parties should coincide with any other; persons convinced of the expediency of extended popular control over government might easily differ on questions relating to the limits of governmental interference, or on the proper character of the foreign policy of the State.

The division into parties that I have just sketched is supposed to be based on disinterested differences in political judgment. To complete the sketch we have—as I said at the outset—to consider the influences that the divergent interests of different classes are likely to exercise in determining such combinations. But, apart from the necessity of uniting for electoral purposes, I conceive that this influence would naturally tend to complicate rather than to simplify the formation of party groups; since the divisions corresponding to difference of interests would vary very much according to the nature of the legislative or administrative measure that was under discussion; while, again, persons of the same class would often disagree profoundly as to the best means of promoting their sectional interests, from the same causes that lead to disinterested disagreements as to what is best for the community as a whole. It may be urged, however, that the most obvious division of interests is that between the poor and the rich; and that this must tend to coincide broadly with the division between the advocates of government by the people, and the advocates of government by a highly educated minority; since the latter will tend to be largely drawn from the richer classes, who enjoy superior educational advantages, and will at any rate usually belong to these classes, from the higher remuneration that their skill commands. And I

admit that on some momentous questions—such as the distribution of taxation — the political interest of the mass of the poor is *primâ facie* opposed to that of the rich. Still there are many subjects of fundamental importance, on which the natural line of separation of parties according to interests would seem to be quite different. For instance, if protection is demanded for certain native industries, of which the products are consumed by the poor, the interest of the labourers employed in these industries would be opposed to that of the poor consumers outside. Again, if the issue of war or peace should be raised, there is no reason why the poor should agree any more than the rich on the difficult question, whether the prospect of suffering and loss from war is a less or greater evil than the dangers incurred by submitting tamely to foreign encroachments. Similarly if the question should be as to the extent of the provision required for warlike purposes, the line of separation is likely to be determined by differences of political judgment rather than by manifest conflict of interest; since it is no more the interest of the poor as a body than of the rich as a body that the provision for war should be inadequate, and no more the interest of the rich than of the poor that it should be excessive.

§ 2. On the whole, then, I should conclude that the formation of parties in a modern state which would naturally result from the grouping of persons either according to similarity of convictions or community of interests, or both combined, would probably be of a complicated and shifting kind; and that it would almost certainly have a multiple and not a dual character. And if we put out of sight the influence of elections—especially elections of the head or heads of the executive—there appears to be no sufficient reason why a group of persons united by common principles, or common interests, should enter into permanent union, for political purposes, with another group formed on an entirely different basis. No doubt such a union might sometimes be the easiest way of forming a majority for carrying the measures which each group desires; but it would be an

obviously artificial means to this end: since the success of any one party such as we have been considering, in obtaining a majority in favour of its measures by the more natural and legitimate methods of reasoning and persuasion, would not interfere materially with the efforts of another party to carry measures relating to a different subject.

The case is no doubt altered when we take elections into account; at least under a system in which no provision, or no adequate provision, is made for the representation of minorities; since in any such election, if the vacancies are filled up by the candidates of one party, the candidates of any other party can only be elected accidentally, unless the parties have formed an alliance, and agreed upon a common list of candidates. Hence arises an important influence, tending to reduce the number of competing electoral combinations to two. It seems not unlikely, however, that such combinations would be very transient, and would vary from place to place, if the sole concern of the electors were to choose representatives for the purpose of legislation: the decisive impulse towards a permanently dual organisation of parties appears to be given by entrusting to the constituencies, along with the election of members of a central legislative assembly, the practical choice of the chief or leading members of the central executive. This choice, as we have seen, takes place in strikingly different forms in the English and American systems respectively; still, its effect both at the quadrennial presidential elections in the United States, and at ordinary general elections in England, is to concentrate the interest of the whole country on an electoral struggle, in which, if any political combination does not form part of the victorious majority, it has failed so far as this contest is concerned. This gives a powerful and continually operating inducement to the absorption of minor parties in one or other of two great combinations; the force of which is further increased in the United States by the "Spoils system"—the practice of making extensive changes in the minor posts of the executive to reward members of the winning party—and by the con-

trol over legislation which the veto gives to the President; while in England, again, it is importantly increased by the practical control over legislation which the Cabinet possesses, as a committee of leading members of the legislature that has normally the practical power of dissolving the representative assembly when it chooses.

In this way the organs of representative government in both countries equally—in spite of the great differences in their political systems—have come to be normally the organs of one or other of two permanently opposed and competing parties;[1] and, correspondingly, the hostile criticism of governmental measures, carried on in the press and public meetings, is mainly directed and largely supplied by the systematic effort of a defeated party to discredit and supplant its dominant rival. It is true that this tendency to duality in the composition of parties does not altogether overcome the tendency to plurality; each of the two opposing parties is often composed of parts which very imperfectly cohere, and from time to time a party breaks up and new combinations are formed; also, independent parties of minor importance may exist side by side with the two chief divisions; but in the main the tendency to duality predominates.

§ 3. I shall presently consider how far it is possible, by any constitutional arrangement, to overcome this tendency to a dual division into parties; but before considering this, it will be well to examine carefully its drawbacks and advantages.

The advantage that would probably first suggest itself to an Englishman, or to a member of any European community that has imitated England in organising representative government, is the gain in stability obtained from the dual division. Where there is a multiplicity of parties,

[1] There is the important difference that in England the Supreme Executive Cabinet must always—except for rare and very brief intervals—belong to the same party as the majority in one of the two Chambers which possesses a great preponderance in power over the other; whereas in the United States the party to which the President belongs might easily be in a minority in the House of Representatives during half the period of the President's tenure of office, and in a minority in the Senate during the whole period.

the chances are that no single party will have a majority in the legislature; hence any majority that may be temporarily formed from a combination of parties is likely to lack internal coherence; its elements—and similarly the elements of the opposing minority—will be easily separated, and easily made to recombine into a differently composed majority and minority. In this way the instability, which we have been led to regard as in any case a defect of English Parliamentary government, is likely to be on the average much more marked if there is not a firm dual organisation of parties.

This advantage of the dual system is mainly important when the executive is dismissible at any time by a Parliamentary majority. The next that I shall notice applies to a great extent to almost any mode of organising representative institutions. It consists in the more regular, systematic, and sober criticism of governmental measures to which the dual party system leads. The object of the "outs" as a party being to get "in," it becomes the business of the leaders to scrutinise the measures of the ministry continually and closely, and bring to light all their weak points in order if possible to overthrow the ministry, or, at least, to inflict on it a loss of prestige. At the same time there are strong inducements—apart from patriotism—to make the leaders of an opposition, who naturally look forward to becoming ministers, abstain from attacking measures that are wisely chosen and framed. For if they do *not* defeat the ministers, the blow they have tried to deliver is likely to recoil on themselves; while, if they succeed, and bring their party into power, they may find themselves seriously hampered in the management of affairs if circumstances should arise in which a similar measure to that which they have attacked may appear obviously expedient. In short, under the dual party system, the leaders of the opposition tend to criticise keenly, from desire to oust the holders of power, and yet circumspectly, being aware of the responsibilities and difficulties which success, bringing power, must entail.

A more doubtful argument sometimes urged for the dual

party system is that it is required to maintain a permanent and comprehensive interest in political struggles. With the multiple party system, it is said, the centres of political influence would be chiefly leaders or organisers of more or less narrow combinations on behalf of avowedly sectional interests, or of more or less fanatical combinations to promote certain measures of a violent change. From such parties, it is said, the quiet steady-going citizens—who form the best element of any electorate—would mostly stand aloof, and consequently they would take comparatively little interest in the elections and gradually lose the habit of fulfilling their constitutional duties. It is, I think, likely that this result would happen to some extent from the substitution of the multiple for the dual party system; *i.e.* I think that the latter tends to make party feeling more general, and that strong party feeling is, in average men, a more powerful impulse to action than a mere sense of civic duty. But I do not feel sure that serious loss would result to the community if such of the citizens as can only be induced to perform their electoral duties by the tie of party should withdraw altogether from political functions.

For it is, on the other hand, a fundamental objection to the dual party system that it tends to make party-spirit, if perhaps less narrow and fanatical, at any rate more comprehensive and absorbing. Where parties are numerous and limited in their scope, there are likely to be many cross-divisions, so that persons who are opposed on some questions will be allied on others, and there is less probability that they will regard all questions habitually and systematically from a party point of view. Whereas, where the system of two permanently opposed parties is firmly established, the sentiment of "loyalty to party" becomes almost as tenacious and exacting as patriotism, and sometimes almost equally independent of intellectual convictions; so that a man remains attached to his party from old habit and sentiment, or from fear of being called a renegade, when he can no longer even imagine that he holds its "fundamental principles." As sentiment and habit are thus semi-

unconsciously substituted in many cases for intellectual agreement as the bond of party-union, the fundamental principles of either party become obscure;—a result which each party keenly perceives in the case of the other, though remaining partially unconscious of it in its own case.

One consequence of this is, that while the two-party system diminishes in some respects the defects of parliamentary government, it intensifies them in other respects. The attack on governmental measures by the party in opposition tends, as I have said, to be less rash and fanatical than it might otherwise be; but, on the other hand, it tends to be more systematically factious and disingenuous. Good legislation has to be avoided by the party in power, not only when it is such as would be naturally unpopular, but when it can be successfully discredited by partisan ingenuity; and the same cause is liable to hamper the operation, or impair the effect of, necessary or highly expedient measures of administration.

Again, the tendency before noted in parliamentary government of the English type, to entrust executive power to parliamentary leaders who are not specially qualified for their administrative functions, is aggravated by the permanent division into two competing parties. Even if there were no such division, a parliamentary executive would be always liable to include orators and parliamentary tacticians devoid of administrative skill; but it might be possible to retain in office an administrator of conspicuous merit, even though his political opinions, in matters outside his department, were opposed to those of the majority for the time being; and this becomes impossible when the dual division is thoroughly established.

Further, the dual system seems to have a dangerous tendency to degrade the profession of politics: partly from the inevitable insincerity of the relation of a party leader to the members of his own party, partly from the insincerity of his relation to the party opposed to him. To keep up the vigour and zeal of his own side, he has to maintain the fiction that under the heterogeneous medley of

opinions and sectional interests represented by the "ins" or the "outs" at any particular time there is a fundamental underlying agreement in sound political principles; and he has to attribute to the other side a similar agreement in unsound doctrines. Thus the best political talent and energy of the country acquires a fatal bias in the direction of insincere advocacy; indeed the old objection against forensic advocacy as a means of obtaining right judicial conclusions —that one section of the experts employed are professionally required to make the worse seem the better reason— applies with much more real force here than in the case of the law-courts. For in the case of the forensic advocate this attitude is frankly avowed and recognised by all concerned: every plain man knows that a lawyer in court is exempt from the ordinary rule that binds an honest man only to use arguments which he believes to be sound; and that it is the duty of every member of a jury to consider only the value of an advocate's arguments, and disregard, as far as possible, the air of conviction with which they are uttered. The political advocate or party leader tends to acquire a similar professional habit of using bad arguments with an air of conviction where he cannot get good ones, or when bad ones are more likely to be popularly effective; but, unlike the forensic advocate, he is understood, in so doing, to imply his personal belief in the validity of his arguments and the truth of the conclusions to which he desires to lead up. And the case is made worse by the fact that political advocacy is not controlled by expert and responsible judges, whose business it is to sift out and scatter to the winds whatever chaff the pleader may mingle with such grains of sound argument as his brief affords; the position of the political advocate is like what that of a forensic advocate would be, if it was his business to address a jury not presided over by a judge, and largely composed of persons who only heard the pleadings on the other side in an imperfect and partial way.[1]

[1] The demoralising effect of politics under the party system seems to me an argument of weight for keeping the business of statesmanship as far as

What has just been said applies primarily to the leading members of a party who undertake the task of advocacy. But the artificiality of combination which the dual system involves has to some extent a demoralising effect on other members of the legislature; they acquire a habit either of voting frankly without conviction at the summons of the "whip," or of feigning convictions which they do not really hold in order to justify their votes.

And the same cause impairs the security for good legislation, apparently furnished by the fact that a measure can only be passed if it has the approval of a majority of the legislators; since it increases the danger that measures may be passed which are only desired and really approved by a minority—it may even be a small minority if sufficiently fanatical or selfish;—such measures being acquiesced in by the rest, under the guidance of their leaders, in order to maintain the party majority.

§ 4. Of the gravity of these disadvantages it is difficult to form a general estimate, as it depends largely on the condition of political morality, which is influenced by many causes more or less independent of the form of government: but we may reasonably regard the disadvantages as sufficiently grave to justify a serious consideration of the means of removing or mitigating them. The available remedies are partly political, partly moral: the former will naturally vary much according to the precise form of government adopted. If the Supreme Executive is practically dismissible at any time by a Parliamentary majority—even with the possibility of appealing to the country—the danger of transient and shifting Parliamentary majorities is so great and obvious, that a nation in which the two-party system is firmly established is hardly likely to abandon it. But the case is different with other forms of Representative Government. For instance, where there is a supreme executive appointed

possible unremunerated by money; the work itself is liable to be so degrading, when carried on under the conditions above described, that its dignity can only be maintained by its being performed gratuitously: if the business of keeping a party together and leading it on to victory becomes a trade, it becomes a vile trade.

for a fixed period, without the power of dissolving Parliament, there is less manifest need of this system than where the executive holds office on the English tenure, and less tendency, *ceteris paribus*, to promote its development: since, in the former case, the party struggle in parliament is not kept always active—as it is in the latter case—by the consciousness that the Cabinet or the Parliament may come to an end at any moment. It is true that the example of the United States might be quoted on the other side, since there the fixed tenure of the Presidency has not interfered with the fullest development of dual party government that the modern world has seen. Here, however, I conceive that (1) the election of the President by the people at large, and (2) the "spoils" system, have operated powerfully to foster this development: if there were a Supreme Executive elected by the legislature,[1] with subordinate officials holding office independently of party ties, I think it probable that the tendency to a dual division of parties—and generally the influence of party on government—would be materially reduced.

Assuming that a Parliamentary Executive is retained, the bad effects of two-party government might still be mitigated in various ways. Substantial portions of legislative and administrative work might be withdrawn from the control of the party system, under the influence of public opinion, aided by minor changes in parliamentary rules and in the customary tenure of executive offices. Firstly, as I have

[1] It may be said that the choice of a President by the legislators would become practically the same thing as a choice by the citizens at large, as the latter would elect representatives pledged to elect a certain President. I do not think that this result would necessarily occur: but it would no doubt be not unlikely to occur, especially if the two-party system were already fully developed before this mode of electing the head of the Executive was introduced. In any case I think that the result would probably be prevented either (*a*) by entrusting Supreme Executive power to a Council instead of to an individual, or (*b*) by placing the time for electing the Executive in the *middle* of the Parliamentary period. There would however be drawbacks to either expedient; as the former would lose the advantage of a monarchical organisation of the Executive, and the latter would somewhat diminish the chance of there being harmony at any given time between the legislature and the executive.

before suggested,[1] on certain important questions, not closely connected with the business of the executive departments, the preparation of legislation might be entrusted to parliamentary committees other than the executive cabinet: and the natural tendency to different lines of divisions on different subjects might thus be allowed fair play.

Secondly, certain headships of departments, in which a peculiar need of knowledge, trained skill, and special experience was generally recognised, might be filled by persons not expected normally to retire with their colleagues, when the parliamentary majority supporting the government of which they were members was turned into a minority; but only expected to retire when the questions on which issue was joined between the parties related to the administration of their special departments.

Again, it would seem possible, by certain changes in the customary relation between the Cabinet and Parliament, to reduce the danger of excessive instability of government consequent on allowing free play to the natural tendency to a multiplicity of parties. Thus, it might be the established custom for ministers not to resign office because the legislative measures proposed by them were defeated,—unless the need of these measures was regarded by them as so urgent that they could not conscientiously carry on the administration of public affairs without them—but only to resign when a formal vote of want of confidence was carried against them in the House of Representatives. This change would at once promote, and be facilitated by, an increased separation of the work of legislation from that of administration.

Again, the introduction of the "Referendum"—even to the limited extent suggested in chapter xxvii.—would at any rate reduce the danger that a minority, concentrating its energies on narrow political aims, may force through legislation not really approved by a majority of the assembly that adopts it.

Finally, the operation of the party-system might be checked and controlled—more effectually than it now is in

[1] See p. 436.

England and the United States by a change in current morality, which does not seem to be beyond the limits of possibility. It might be regarded as the duty of educated persons generally to aim at a judicial frame of mind on questions of current politics, whether they are inside parties or outside. If it is the business of the professional politician to prove his own side always in the right, it should be the point of honour of the "arm-chair" politician, if he belongs to a party, to make plain when and why he thinks his party in the wrong. And probably the country would gain from an increase in the number of persons taking a serious interest in politics who keep out of party ties altogether.

# CHAPTER XXX

## CLASSIFICATION OF GOVERNMENTS

§ 1. THE reader who has accompanied me so far may have observed—perhaps with surprise—that I have made little use of the current terms "democracy" and "aristocracy"; and though I have spoken of the functions of the "monarch," the functionary so named has been conceived as a part of a government which can only be called "monarchical" in a wide sense. The grounds on which, in constructing a government for the modern State, I have thought it best to avoid any reference to the current classification of forms of governments, I propose now to explain; and, in explaining them, to give a final characterisation of the type or types of government which the reasonings contained in chaps. xx.-xxvi. have gradually led me to delineate.

Let us begin by examining the current classification. We are at once reminded by the derivation of the names of the main classes — monarchy, aristocracy, oligarchy, democracy—that it was originally the result of reflection on the varieties of government exhibited in the history of the Greek city-states; and it will be instructive to note the form which the classification assumed in the remarkable treatise in which Aristotle gathered together the fruits of Greek political experience. Aristotle recognises[1] six leading types of government, three good or normal, and three bad or perverted. The names of the three bad types, which I take first, as they were unhappily those that experience chiefly

[1] This classification is substantially derived from Plato (*Politicus*); but it is sufficient here to take it in the Aristotelian form.

presented, are Democracy, Oligarchy, and the irregular and lawless despotic Monarchy which the Greeks called "Tyrannis"; the three good types are called by Aristotle Constitutional Government, Aristocracy, and Kingship. In the three bad types the ruling element—whether one, few, or many—governs unrestrainedly in its own selfish interest; in the good types it aims at the good of the whole community. Of the six types, the first and most divine is true Kingship, the rule of a single man of pre-eminent wisdom and goodness, the "hero as king,"[1] if such a unique being can be found; the emergence of such royal heroes in primitive times was affirmed by tradition in Greece as in other countries, but it is evident that even an approximate realisation of this type is not regarded by Aristotle as within the range of practical politics. A less purely ideal and more vaguely defined type is Aristocracy, in the sense of the rule of the Best, being more than one. The number of these in a state would vary with social conditions; but it was at any rate clear to Aristotle that the persons well qualified for government could only be a minority in any political society, owing to the need of leisure for the attainment of the required qualification.[2]

But the drift towards democracy in the city-states of Aristotle's time was so strong that he could not hope for any widespread realisation of anything like his ideal Aristocracy; accordingly, the form of government which he recommends as a more practical ideal for general imitation is a kind of moderate and balanced democracy, which he calls Constitutional Government:[3] in which a majority of the free citizens—the poorest class being excluded—would possess

[1] Carlyle.

[2] It is to be observed that in Aristotle's ideal State important governmental functions are allotted to all fully qualified citizens who have attained a certain age; but these fully qualified citizens are all persons of leisure, living on the produce of lands tilled by serf-cultivators. I think, however, that the line drawn by Aristotle between Aristocracy and Constitutional Government is somewhat obscure and varying.

[3] We may note as a sign of the drift towards democracy of which I have spoken that Aristotle uses the general term "constitution" or "constitutional government" (πολιτεία) to mean constitutional democracy.

important governmental functions, especially the right of electing their magistrates, and calling them to account, and a sort of balance would be maintained between rich and poor by the preponderant political influence of men of moderate means. But even this type was but rarely realised within the range of Aristotle's experience; the predominant characteristic of the later political development of free Greece was a struggle between rich and poor, in which the winning party set up either selfish and oppressive oligarchy, or selfish and oppressive democracy; unless, as sometimes happened, an ambitious individual took advantage of disorder to establish himself as a Tyrannus. If we wish to arrange these bad forms of government in the order of demerit, we have to invert the order in which I have given the better forms, since of all bad governments the rule of a single individual in his own interest is the worst, and the oppressive rule of the few is worse than the oppressive rule of the many.

It should be observed that Aristotle also uses the terms "aristocratic," "oligarchic," and "democratic" to denote characteristics which the same polity may possess in different elements or features of its constitution; indeed what he calls constitutional government is conceived by him as a kind of mixture of oligarchy and democracy, which may also have in some degree an aristocratic character.

Turning now to the modern use of the terms, I note first that the notions of "monarchy," and "kingship,"[1] "tyranny," and "despotism," are materially changed. The modern term "monarchy" is largely used to denote governments in which only a share of power is left to the single individual called the "monarch."[2] Again, if the power of the monarch is not constitutionally limited we call it "despotism"; but as this term does not suggest a power irregular and lawless in its origin, it does not correspond to the Greek "Tyrannis." On the other hand this latter term is not accurately expressed by the modern "tyranny," because a modern despot would

[1] Aristotle's "Monarchy" includes both Tyrannis and true Kingship.

[2] Aristotle notes a similar use: but he pays little attention to it.

not be called a tyrant unless his rule were harshly oppressive, whereas a Greek Tyrannus might find his interests best subserved by mild and benevolent government: moreover, we consider that oligarchs and democrats can exercise "tyranny" as well as monarchs. Indeed in a modern discussion we should not mention tyranny except as an evil to be guarded against: nor, in constructing a suitable government for a modern State, have we occasion to consider despotism,—except as an alternative possibly preferable to prolonged disorder in certain acute diseases of the body politic. We have, however, noted important reasons for allotting extensive powers to a single individual in the organisations of modern government: not because a modern thinker can, any more than Aristotle, hope to obtain by any practicable mode of appointment a man unique in wisdom and virtue to fill the place of king or president; but rather on account of the greater unity and consistency in design attained by leaving the management of governmental work to a single man, and the greater vigour in execution attained by leaving him unfettered control and undivided responsibility. How far and under what circumstances the executive government should be organised on what may—in this wide sense—be called a "monarchical" plan, has been already to some extent considered: and it will be convenient to defer further discussion of it till we have examined the modern conceptions of oligarchy, aristocracy, and democracy.

In the whole nomenclature the term which has least altered its signification in its modern use is "oligarchy": for we, like Aristotle, commonly denote by this the government of a wealthy minority in their own interest. But the Aristotelian distinction between "oligarchy" and "aristocracy" has been largely obliterated, so that the two terms are often used almost as convertible: still the distinction so far lingers that "oligarchical" has generally a bad signification, while "aristocratic" is felt to be in itself at least a neutral term, even if the person using it disapproves of aristocracy. Moreover, the "aristocratic" element of a

modern community is vaguely understood to be not merely rich, but to have acquired, on the average, through hereditary wealth, leisure, and social position, a cultivation of mind above that of the "masses" and also certain valuable traditions of political experience: so that its claim to a share in government disproportionate to its members is based on a belief in its superior intellectual qualifications. It therefore seems to me possible, without doing too much violence to current usage, to give the term a signification akin to the Aristotelian; accordingly, I shall mean by "aristocracy" the government of persons specially qualified by abilities, training, and experience for the work of government.

I have said "specially qualified," and not "best qualified," because it is a widespread opinion in modern times that the mass of adults—or male adults—in any civilised state is better qualified for the most important political decisions, than any small minority of persons, however much they may be chosen with a view to special qualifications. For, in passing from Aristotelian to modern thought, the associations and sentiments which the word "democracy" carries with it have become very different: the term represents for us not merely a depressingly prevalent political fact, but a widely and enthusiastically accepted political ideal. The drift towards democracy which we note in the later history of free Greece does not appear to have had either as cause or effect a corresponding movement in philosophic thought: but the corresponding drift in modern times is even more marked in the history of political ideas than it is in the history of political facts. But this tendency to idealise democracy is liable to involve some confusion of thought, which I will now attempt to remove.

§ 2. Firstly, persons who adopt a democratic ideal sometimes put forward as the principle of democracy a proposition which is indistinguishable from what I have taken as the principle of good government: viz. that all laws and political institutions should be framed with a view to the welfare of the people at large, so that no privileges should be given to any particular individual or class except on grounds of public

utility. I conceive, however, that this principle not only might but would be universally conceded by the modern advocates of every form of civilised government:[1] so that to treat it as a characteristic principle of democracy introduces fundamental confusion. There is more to be said for distinguishing as democratic the principle that in estimating public welfare, conceived more precisely as "general happiness" of the members of the community, "everybody is to count for one and nobody for more than one."[2] So far, indeed, as this merely means that the happiness of any one member of society should be no more the concern of the legislator than the *equal* happiness of any other member, it is obviously implied in the acceptance of "greatest general happiness" as the ultimate end: but if it is meant that equality in the distribution of happiness is in itself to be aimed at, the maxim is certainly different from the general utilitarian principle which I have taken as fundamental;[3] at the same time I conceive that its adoption is not unlikely to follow from giving the control over legislation to the mass of adults. To this interpretation of "democracy" I shall therefore return; here I will only say that it does not seem to me the proper interpretation, according to the original derivation and prevalent use of the word. The "principle of democracy" ought, I conceive, to relate primarily to the structure of government and not to the mode in which its functions should be exercised.

Limiting ourselves then for the present to the consideration of the structure of government, let us ask how, in this department, we are to define the fundamental principle of democracy. There are, I think, two competing definitions;

[1] I here overlook, for brevity, the possible divergence between the welfare of any one political society and the welfare of humanity at large.

[2] The quotation is from Bentham: I do not, however, think that Bentham intended to deny (1) that one person may be more capable of happiness than another; or (2) that, if so, the former's happiness is more important than the latter's as an element of general happiness.

[3] To aim at equality in distribution of happiness may obviously be incompatible with aiming at the greatest happiness on the whole, if the happiness of one person can ever be increased by diminishing to a less extent the happiness of another already less happy.

or perhaps I should rather say two distinct principles, explicitly or implicitly assumed in arguing in favour of political institutions commonly recognised as democratic. One of these,—which I myself accept as a principle that the modern State should aim at realising—is "that government should rest on the active consent of the citizens"; the other is "that any one self-supporting and law-abiding citizen is, on the average, as well qualified as another for the work of government." This latter proposition I in the main reject; but I admit that, according to one view of the proof of the first proposition, the second is to some extent implied, and that where democracy—as defined by the first proposition—is fully developed, there is likely to be a tendency to accept and act upon the second to some extent.

In order to examine the relation between the two propositions, it will be well to define the former more precisely. In the first place, I mean by "active consent" something quite different from the passive acquiescence, the absence of any conscious desire to change the structure or modify the action of government, which may exist under a pure monarchy or oligarchy no less than under a democracy, wherever the members of the community have lost or have not yet acquired the habit of regarding their government as a condition of life which it is in their power to change. Even in such a society the views and sentiments of the governed ordinarily impose certain limits on their government—there are certain things which the latter abstains from doing for fear of exciting discontent and possible disaster:—but this effect is normally produced without consciousness. By "active consent," on the other hand, I imply that the citizens are conscious that they can legitimately alter the structure or the action of their government if a sufficient number of them choose to go through a certain process; so that if they make no effort to alter either, they exercise a distinct act of choice:—they may not like their government or its ways, but they at least prefer not to take the trouble of trying to change them.

Again, when I speak of the active consent and the pre-

ference "of the citizens," I do not mean to imply that all are agreed. In the various conflicts of desires and interests that must be expected to arise continually within any modern community, a democratic government cannot please everybody any more than a monarchical or oligarchical government; and if the right of the government of the community to determine the legal relations of the persons inhabiting its territory—which we have regarded as almost indispensable for political order and wellbeing—is to be maintained, dissentient minorities must submit or depart. At the same time, it must be admitted that the coercion of a dissentient minority constitutes a special difficulty for a government founded on the principle of consent, especially if the dissentient minority includes a decided majority within a considerable and continuous portion of territory, and prefers separation to submission; since in this case the right of the majority of the whole community to coerce the local majority seems to depend on an accidental union of territories.[1] Hence I conceive that a democratic government will be reasonably averse to such coercion, and will tend to give the inhabitants of each of the districts comprising it as much independence as the interests of the whole community allow, and to decide doubtful points in favour of local self-government.

However this may be, we may agree that the principle of democracy requires the constitution of government, and the general line of its action in reference to the common interests of the whole, to have the active consent of at least a majority of the citizens. And this majority must be *living*,—it would be paradoxical to interpret "consent" as meaning the consent of the most overwhelming majority of the dead. Hence, strictly taken, the principle excludes any fundamental laws which it requires more than a bare majority[2] to alter; if such laws are established—as in most

[1] See the concluding section of the next chapter.

[2] It may even be doubted whether it is consistent with the principle of democracy to require an absolute majority of the citizens—instead of a majority of voters—for any change in the constitution. But I think that,

modern constitutions—the application of the principle of democracy must be conceived to be limited in the interest of stability. And it is to be observed that this limitation may conceivably be so stringent as practically to nullify the operation of the principle: *i.e.* the majority required for changing the laws of the constitutional code may be so large that change is practically precluded.[1]

But further, when we say that a democratic government must be supported by the consent of at least a majority of the citizens, we do not ordinarily mean that this consent should be necessary to the validity of every governmental decision. And this is not merely because the people has not time to consider all matters, and must therefore leave some to the judgment of its servants, the government, just as a private individual with large affairs must do. For a private individual can interfere whenever he likes, and to any extent he likes, in any department of his affairs; any decision he may communicate at any moment must be obeyed by the servant or agent to whom it is communicated. And, as we have seen, it is sometimes implied in the utterances of orators appealing to democratic sentiment that the judgment of the majority should similarly always be obeyed when it is declared. But the inconvenience of sudden irruptions of uninstructed popular opinion into matters which cannot be understood without prolonged and careful study is so obvious and palpable, that, so far as I am aware, no practical statesman, however demagogic, has ever proposed such an arrangement in the most democratic of modern States. At any rate we may take it as most commonly admitted that the democratic principle must practically be limited by confining the authoritative decisions of the people at large to certain matters and certain periodically recurring times; and committing the great majority of governmental decisions to bodies or individuals who must have the

when adequate provision is made to enable all citizens to vote without serious inconvenience, those who prefer not to vote for a proposal of change may be said to give "active consent" to what is established.

[1] The ¾ths majority (of state legislatures or conventions) required in the Constitution of the United States has nearly had this effect.

power—and, I may add, the duty—of deciding without the active consent of the majority and even against its wish.

§ 3. The question then arises on what principle, in a democracy, the particular persons should be selected to whom this large part of the work of government which cannot advantageously be undertaken by the people at large is to be entrusted.

Here we have to consider the second definition that I gave of the fundamental principle of democracy, "that one honest and self-supporting citizen is as well qualified as another for the work of government." This principle was largely carried out in Athens, and elsewhere in the city-states of ancient Greece, by the method of choosing officials by lot, from among the citizens of unblemished civic character. And though no similar attempt to realise this principle is discernible in modern arrangements for democratic government, it seems necessary to consider it; since it may be plausibly argued that its rejection logically involves the rejection of the principle that government must rest on popular consent. For, it may be urged, if we require special qualifications for the minor decisions which even democracy leaves to particular persons and bodies, we ought to require them still more for the more important decisions reserved to the people at large.

In considering this argument we have to take into account partly intellectual, partly moral qualifications. As regards the intellectual qualifications, the analogy of economic relations may be adduced; since in these it is generally admitted that the judgment of the consumer must be combined with that of the producer to obtain the right result; and in political matters the people as a whole seems to be related to the experts who perform the detailed work of governing, much as the consumers are to the producers in other arts. The analogy is no doubt vague, as the relation varies in different arts. *E.g.* in house-building the consumer is better qualified to form a judgment on some of the particular questions that arise than the producer is;

knowing his own needs and habits he can generally decide the number, size, and to some extent shape of rooms that he wants better than the architect can, though he cannot so well determine how they should be put together. In other cases there are no particular matters in deciding which the consumer has a similar advantage ;—*e.g.* in medicine, though the patient can tell whether a certain treatment makes him uncomfortable, he cannot tell whether this discomfort should prudently be endured, for the sake of the ultimate gain to health that may be expected to accrue from it. Still, as time goes on, if the patient grows steadily worse, and especially if a promised amendment does not realise itself, he will be thought right in taking other medical advice. Accordingly, among those who accept generally the principle of democracy, there are some who consider the art of government more analogous to house-building, and regard the people at large as best qualified to determine the main lines of legislation and administration ; while others consider it more analogous to medicine, and hold that the people should judge for itself from time to time as to the general success of its government in promoting the wellbeing of the country, but should not judge for itself on particular questions. It is in harmony with either view that the people's assenting judgment—whether directly or indirectly given—should be regarded as indispensable to the determination of the aggregate expenditure for governmental purposes: as in the case of other arts no one would recommend that the consumer in employing any expert should give the latter *carte blanche* to apply his skill regardless of expense.

As regards moral qualifications, it would be going too far to say that the "people"—as politically defined—has no "sinister interests" opposed to the interests of the community as a whole. It is obvious that in the most democratic state there is a mass of non-voters whose interests may be unduly postponed to those of the voters, that the interests of posterity may be unduly sacrificed to those of the present generation, and that a minority of the voters may

be unduly sacrificed to the majority. Still, though the electorate as a body may possibly be swayed by narrow and sectional interests, any particular section of it is, *primâ facie*, more likely to be so swayed; and it may be truly said that the people at large is free from certain sinister interests by which governing persons are liable to be influenced: as the latter are under temptations to confer on themselves emoluments, privileges, and powers beyond what is expedient for the public good, and to extend the work of government in order to increase the mass of these advantages. Hence, there is a strong reason for giving weight to the judgment of the people at large in the decision of these and similar matters, however completely we admit the need of experts for the decision of most details of governmental work.

But further, democratic government may be preferred, not because it is likely to be better conducted, but because it is likely to be better obeyed. One fundamental reason for the acceptance of the principle that government should rest on the active consent of the governed, is, that it reduces the danger of revolution. If the majority of a nation are able to modify, in an orderly and regular way, their laws and the action of their government, a minority desirous of change will, ordinarily, be only tempted to resort to physical force when it is hopeless of becoming a majority; and as such a minority must expect to have opposed not only the majority of persons averse to the change, but also all other citizens who consider the advantages of the change, if any, to be outweighed by the evils of revolution, it will only be under exceptional circumstances that the temptation to revolution will be strong.[1] Here again, so far as our

[1] On the other hand, the habit of regarding government as something which an ordinary citizen may reasonably hope and try to get changed, if he dislikes it, supplies a powerful force on the side of political change in democratic communities; and, admitting that the majority of such changes will be conducted in an orderly manner, we cannot be sure that they will all be so conducted, especially where there are large standing armies; since the decision, in a conflict of physical force, is likely to rest with the trained soldiers; so that a party defeated at the polls will have a temptation to achieve its ends

acceptance of the democratic principle rests on this latter ground, it is obvious that it does not logically lead us any way towards the conclusion that any ordinary honest citizen is as qualified for government work as any other.

§ 4. Accordingly, it is generally admitted by theoretical advocates of democracy in modern times that the part of government work which is entrusted to particular individuals or elected assemblies should be entrusted to persons specially qualified. And so far as this is admitted, the principle of aristocracy, as above defined,—that the work of government is a form of skilled labour which should be in the hands of those who possess the requisite skill—is implicitly accepted. Hence, I do not consider representative government — even when the suffrage is universal — as merely a mode of organising democracy, but rather as a combination or fusion of democracy and aristocracy. This fusion or combination may become less or more aristocratic in character through various minor modifications. Thus, it may be made less aristocratic by increasing the intervention of the people at large in legislation—through measures like the "referendum" and "initiative" before mentioned—by shortening the time for which the legislature or the executive is appointed, by the habit of demanding elaborate pledges at elections, or even imposing "mandates" at other times to which the representatives submit, and by the practice of appointing executive officials on grounds other than their qualifications for office. Correspondingly it tends to be made more aristocratic by lengthening the duration of parliaments, by the habit of choosing representatives for proved ability, and abstaining from the exaction of pledges and the imposition of mandates, and by the practice of giving executive appointments to the persons best qualified

by caressing or corrupting the army. I think, therefore, that there is, on the whole, no adequate reason to assume that democratic governments are likely to be less in danger of violent revolution than other forms of government in States of which the members do not regard government as something naturally changeable. But I should still hold that when government has come to be thus regarded, a democratic form of government—in the sense above defined—affords the best chance of stability.

to fill them. But these latter modifications can hardly be said to make it less democratic, in the sense in which I first defined—and in which alone I accept—the democratic principle: at least so long as the consciousness of active consent remains vigorous in the citizens generally.

It may be said, however, that such an introduction of the aristocratic principle as is involved in the representative form of government will not be sufficient to prevent the masses, stimulated by demagogues, from forcing on legislation having the character which Aristotle attaches to the term "democracy"; *i.e.* legislation oppressive to the rich, and therefore sacrificing the interest of the community as a whole to the sectional interest of the poor majority. Indeed, as I have already said, some persons regard it as an essential characteristic of the democratic form of government, that the power of government is used to promote the interests of the masses. And certainly in any dispute between the poor majority and the rich minority, the former, being through democracy "judges in their own cause," are likely to give a verdict in their own favour: especially as, from their numerical preponderance, it is less palpably wrong to identify their interests with that of the community as a whole. Hence it may be plausibly maintained that, even if the principle of electing the best qualified be carried out successfully to some extent, it will not prevent the real ultimate interest of the community from being sacrificed to the immediate or the apparent interests of the masses; the persons chosen as legislators or administrators may be really skilful and able in adapting means to political ends, but they will be under irresistible pressure to use their talents in promoting sectional rather than national interests. I do not myself think that this danger can be completely guarded against; but I am inclined to hope that it may be materially reduced if the legislators receive no salary; since they will then be more independent, and being drawn in the main from the minority of persons of wealth and leisure, will be generally disposed, from training and habit, and also from regard to the sentiment of their class, to do justice to

the reasonable claims of the rich in any disputed question on which rich and poor are opposed.

In fact, by establishing non-payment of legislators, we introduce an oligarchical element into the government, and effect in some degree the kind of fusion between oligarchy and democracy which Aristotle recommended as the best practical solution of the war of classes in the city-states of Greece. And I think that non-payment of legislators is likely to be an institution more easy to maintain against a strong drift towards democracy than other oligarchical expedients—limited suffrage, plural vote, etc.—because it has the advantage, which the poor are likely to appreciate, of saving money. For the same reason the oligarchical effect of the measure is not likely to be extensively neutralised—though it may be to some extent—by combinations of the poor to elect members of their own class and pay them a salary.

According to my view, then, the representative system in its best form will realise to a substantial extent the principle of aristocracy in combination with the principle of democracy. More often, however, in modern constitutions, the principle of aristocracy has been thought to find a partial application in the construction of a senate or "upper" chamber, on a non-representative basis, side by side with a representative branch of the legislature. And such a senate may fairly be called "aristocratic"—in the sense here given to the word—if its members are selected by the executive on the ground of special qualifications, or obtain their seats *ex officio*. On the other hand, heredity, pure and simple—the inheritance of membership of a class absolutely closed—is, as a mode of assigning governmental functions, but doubtfully aristocratic;[1] while it is intensely oligarchical, in the strict numerical sense of the term, and tends to be so in the Aristotelian sense also; since such members of the governing caste as have not inherited wealth are likely to use their inherited power, if it be substantial in amount, as a means of obtaining

[1] See chap. xxiii. § 3.

wealth. So far, however, as merit opens an entrance into the privileged body and demerit excludes from it, it acquires a partially aristocratic character.[1]

In any case, whether we view these modes of appointment as aristocratic or oligarchic, I conceive that any or all of them are perfectly reconcilable with democracy if they are only applied to a part of the supreme government, and if the constitution under which they are applied rests on the active consent of the citizens. It is quite conceivable that a people might at once maintain a full consciousness of being able to alter their government if they chose, and yet maintain even heredity as an element in the construction of one or more among the highest organs of government—from a strong apprehension of its advantages as compared with any available alternative.[2]

§ 5. The last statement applies equally to the case in which one of the highest organs of government is an individual. Indeed the principle of monarchy in the wide sense before explained—the attribution of large governmental powers to a single individual—would seem, so far as rationally justifiable, to be a particular application of the principle of aristocracy; since it is obviously desirable that such an individual should possess very special qualifications for government. Still, it seems better to treat the two principles as distinct; since, as we saw, the main argument for monarchy does not depend on the possibility of finding an individual uniquely qualified for the work entrusted to him; but rather on the advantages gained by the concentration of power and responsibility[3] in one man's hands, even when the individual selected may not be markedly superior to several other available candidates for the post.

[1] The English peerage has the former of these characteristics; and should it ever be thought worth while to reform the House of Lords while retaining its hereditary basis, it would seem desirable to increase its aristocratic quality by some arrangement tending to exclude the sons of peers who have given no evidence of qualification for the work of government.

[2] I do not, however, think this result probable or desirable. See ch. xxiii. § 3.

[3] It must be observed that if the monarch obtains his post by inheritance, the responsibility is only maintained by the fear of disapprobation and disorder.

It is to be observed that the importance of the set advantages —as compared with the gain of the more many-sided and balanced consideration of questions, and the more circumspect and generally more influential judgments, that may be expected to be obtained from a bench or council or assembly,—is very different in different departments of work. No one, I think, doubts that it is better to entrust the management of a campaign to a single man; on the other hand, it is generally agreed that the legislative organ in a modern State must, with a view to efficiency as well as to popular acceptance, include a number of persons representing respectively different sections of the community; nor would any one propose that the supreme court of justice should consist of a single judge. The sphere of the monarchical principle is to be found, if anywhere, in the organisation of the executive.[1] The practical questions, then, for modern states, so far as monarchy is concerned, are (1) how far is it desirable that the executive should be under a single head? and (2) how far is this arrangement reconcilable with the prevalence of democracy?

The first question has been fully considered in a previous chapter (xxii.). We saw that in the English system of parliamentary government, though the supreme executive cabinet may be for long periods completely under the control of the prime minister, it is hardly possible to *secure* this result; since the extent of the predominance of the prime minister over his colleagues must largely depend on his personal influence with Parliament and with the people. It seems therefore necessary, in order to give the supreme executive a regularly monarchical organisation, that the effective head of the executive—whether holding office for life or for a short period—should be irremovable by Parlia-

[1] It should be observed that the monarchical principle—in the wide sense here used—may be applied in a subordinate way by organising each separate department of the executive under a single head, with a considerable power of making independent decisions, even though supreme executive power is vested in a council or assembly. The expediency of this mode of organisation has been already discussed (chap. xxi.), and I have thought it best not to complicate the present discussion by introducing this question here.

ment. Accordingly, in chapter xxii. I discussed the advantages and drawbacks of various measures designed to secure a substantial amount of independence to a president appointed for a fixed period, or a hereditary monarch who is understood to govern as well as reign. And—turning now to the second question—I do not think that such measures can be properly regarded as "anti-democratic," if it be once admitted that it is not inconsistent with democracy for the people to entrust a part of the work of government to particular individuals or bodies. I do not even conceive it to be in any way undemocratic in principle, though it would doubtless be practically dangerous, to give the supreme control of the whole current work of government, legislative, administrative, and judicial, to a single ruler for a limited period: provided the period be sufficiently short to make the responsibility of the ruler to the people a reality, and to keep alive both in his mind and theirs the consciousness of their constitutional function of judging their ruler's work. But such a concentration of power, as I have said, no one proposes—except, perhaps, temporarily as a remedy for prolonged disorder; it is agreed that the monarch in the most monarchical modern State must normally govern along with a legislature independently elected, and judges whom he cannot of his own sole will dismiss. And, as I before argued in considering aristocracy, it seems to me not inconsistent with the principle of democracy, as I have defined it, that a power of this latter kind should be held for life, and even obtained by inheritance, instead of being obtained for a short period by election.[1]

In conclusion, it may be observed that when we compare the forms of government of the ancient Greek city-state with those of the modern West-European state, we cannot but note the diminished onesidedness with which the different principles that we have been discussing tend to manifest themselves in the latter case. In the most civilised

[1] I do not, however, think it probable that hereditary monarchy will be freshly introduced, nor, under ordinary circumstances, permanently maintained, in a state whose constitution is effectively under popular control.

period of the Greek city-states we find oligarchical government maintained or revived in a certain number of cases, with occasional lapses into unqualified despotism; while where the democratic principle is triumphant, it manifests itself in institutions—such as huge popular juries and magistrates chosen by lot—which the most democratic of modern publicists cannot approve. In modern West-European states we see no tendency to pure oligarchy and but little tendency to pure despotism: the representative system naturally combines with democracy an element of aristocracy—in the sense of government by persons specially qualified: and the principle of monarchy has also been to an important extent maintained in combination with that of democracy. Nor do I see any reason to think that either the need of special qualifications for the efficient performance of governmental work, or the advantages of unity of administration, are likely to diminish, or to be less appreciated, in the future history of these states, so far as we may without rashness conjecturally forecast it.

NOTE.—It may be thought, perhaps, that in the above discussion I have not sufficiently concentrated attention on the question, "Where supreme political power or sovereignty" resides in the modern forms of Government that we have been considering. The reasons why I have reserved this question are explained in the next chapter.

# CHAPTER XXXI

## SOVEREIGNTY AND ORDER

§ 1. In the second chapter I gave reasons for postponing the final discussion of the question where sovereignty or supreme political power resides in a political society. I now propose to take up this question, with especial view to such a structure of government as has been gradually worked out in preceding chapters (xx.-xxvii.). But before attempting to answer the question, it is important to obtain as clear a conception as possible of its meaning.

"Power," in the widest sense in which we are here concerned with its definition, is said to be exercised by any person whose directions are habitually carried into effect by other persons.[1] But political power is clearly only one species of this. Thus, a leading critic of literature may be said to exercise power when his directions to buy and read certain books are widely carried out by cultivated members of his community; but he would not be said to exercise political power. And this is not merely because the regulation of literary taste is not a normal function of government. For similarly, if a physician's directions to parents in general to vaccinate their children were widely obeyed from general confidence in his medical skill, he might be said to exercise power; but it would still not be political power;[2] though

[1] In a stricter sense, "power" is only exercised when the obedience which is its counterpart is prompted by the prospect of consequences depending on the will of the person obeyed. See p. 600.

[2] Unless the physician's directions were obeyed *in spite of* an order of government prohibiting vaccination. In this case it would at least be doubtful whether he had not a share of political power.

if the legislature issued the same orders and obtained similar obedience it would be exercising political power. The obvious difference is that the legislature's orders might be enforced by physical violence: if it commanded vaccination under penalties, the requisite physical force would be exercised by certain other members of the community for the enforcement of the penalties, and this exercise of force would not be resisted by the bulk of the rest of the community.

But then directions, backed with physical force, might be similarly given by a secret agrarian society in Ireland, or a "Mafia" or "Camorra" in Italy, with the effect of securing obedience. Would this be an exercise of political power? Our answer to this question would depend on the *extent* of the obedience. In any case the physical force would be illegal and anti-governmental; but if the directions backed by this illegal force were obeyed to anything like the same extent as the directions of government, we should recognise that the power normally belonging to government had been partly transferred to the illegal directors, in a disorderly way. It may however be held that the power thus transferred would not be properly political, on the ground that the "political" character of a society is lost or impaired when it falls into disorder and anarchy. Hence, in considering where supreme political power resides in a state that has a certain constitution, it seems best to assume that no other persons' commands are widely[1] obeyed by adults from fear of physical force, except those issued by or under the authority of Government. In such a state, then, political power, if not solely exercised by the organs of Government, must at least take effect through them.

[1] I say "widely," because the normal structure of government—including as it does an apparatus for detecting, judging, and punishing crime—implies that a certain amount of illegal force will continually be exercised, and it is probable that some of this force will be occasionally used to procure obedience to illegal orders; therefore, when we speak of a state as in an orderly condition, we must be understood to mean that the illegal coercion exercised in it does not exceed a certain vaguely defined amount—being due not to abnormal weakness on the part of the government, but chiefly to the difficulty of capturing all criminals and proving all crimes.

At the same time it cannot be said that the motive to the general obedience which is the counterpart of political power is always fear of the physical force which government is able, in the last resort, to wield; experience shows that various other motives co-operate in producing obedience to government. Apart from mere habit and custom, the predominant motive in any particular case may be moral, springing from the opinion that government have a right to command. Or—especially in the case of those who are "servants" as well as subjects of government—it may be hope of remuneration, or fear of dismissal from service. Or, again, in some cases the motive may be fear, not of the exercise of the physical force which government directs, but of its non-exercise; fear of the withdrawal of the aid or protection of government. In short, while the fear of physical force must be recognised as having a place among the motives that produce general obedience to the commands of government, it need not be the sole motive, nor that actually operative in any particular case.[1]

§ 2. Hence arises a question of great importance in determining the attribution of supreme political power. Suppose that an individual or body that is a recognised organ of government, and whose orders accordingly obtain general obedience partly from fear of orderly physical force, habitually obeys the directions of another individual or body from fear not of physical force at all, but of other consequences: is the power exercised by the latter political power? *E.g.* if a monarch habitually obeys the directions of his minister, believing in the latter's wisdom and fearing the discredit of acting foolishly—but no further evil—does the minister exercise political power over the monarch? Or, again, if a secular monarch habitually obeys the directions of a priest in

[1] It is, indeed, conceivable that order might be maintained throughout a certain region by a Government resting on public opinion or supernatural sanctions alone; which would accordingly be distinguishable from the government of any voluntary association that exists in modern States by its power of compelling those who would not obey it to emigrate. But such a Government—at least in a modern civilised State—is so purely imaginary that I need not discuss it further.

matters of secular government, from fear of the extra-mundane consequences—divine wrath or disfavour—which he expects to follow from disobedience, is the priest, so far as he obeys no one else, politically supreme? Or if the monarch has an ambitious mistress, able to dictate to him through his fear of offending her, are we therefore to attribute supreme political power to the mistress?

Perhaps in the first two cases, it may be said to be rather "influence" than "power," strictly so called, that is exercised; if the minister is not supposed to cause the bad consequences of nonconformity to his directions, and if the priest is merely understood to warn the monarch of the extra-mundane penalties that will attend certain kinds of conduct, independently of the priest's volition. Accepting this limitation, we may observe that the priest, at any rate, may also be naturally understood to threaten divine wrath of which he can control the operation, in virtue of a divine commission to "bind or loose"; and if by such threats he induces the monarch to issue commands in conformity to his priestly dictation, we shall agree that he exercises power, political in its effects if not in its nature. And, generally, if a monarch, otherwise clearly supreme, habitually conforms to the directions of another person from fear of consequences which are believed to depend on that other person's volition—and if that other person is not similarly directed by a third party—it seems clear that the ultimate power of producing political effects has temporarily passed from the monarch to his director. At the same time I do not think that we should affirm a transfer of sovereignty in such cases; the reason being, that the consequences feared are not supposed to be of a kind which would still prevent the monarch from exercising supreme power unimpaired, if he made up his mind to face them.[1] It would seem, therefore, that power exercised on an organ of government is not

[1] It would no doubt be rhetorically admissible to say that under Louis XIII. Richelieu, or under Louis XV. the Pompadour, was the political sovereign of France; but the phrase would be recognised as a flight of rhetoric. And the reason for this clearly is, that the minister or the mistress would have lost their power the moment they lost the king's favour; the king would

to be regarded as the power of a political superior unless the person or body of persons exercising it is able to enforce obedience on the organ, by withdrawing or diminishing its own governmental power.

To make this clearer, let us take another case—otherwise very similar to those just discussed—in which the consequences feared are incompatible with the unimpaired exercise of political power by the person who obeys from fear of them. Suppose that a monarch habitually obeys a priest, not from fear of the extra-mundane penalties threatened by the latter, but from fear of finding it difficult to obtain obedience from his subjects if they believe him to be a special object of God's anger,—we shall agree that he no longer completely possesses supreme political power. And if the influence of the priesthood over the monarch's subjects were so strong that the bulk of them would unquestioningly obey a direction of the chief priest to cease obeying the monarch, and if, therefore, the chief priest's directions were habitually obeyed by the monarch,—it would hardly be denied that the priest had become, really if not nominally, the political superior of the monarch, and that the type of government had been transformed from a monarchy to a theocracy. This would be generally admitted, even supposing that the priest would not be obeyed if he tried to assume the monarch's place, and to give commands, on the ordinary matters with which government deals, to officials recognised as subordinate. *E.g.* if, in the Middle Ages, the Pope could have deposed and appointed secular monarchs at will, without meeting with serious resistance, he would surely have been sovereign in western Christendom although the Church, while claiming the "two swords"—secular and spiritual—never claimed to *wield* the secular sword. And generally speaking, if, in any community, any individual has unquestioned[1] power of withdrawing power

have retained his power whether Richelieu or the Pompadour had been displeased with him or not.

[1] The case in which the attempt to withdraw power would lead to conflict and disorderly violence will be considered later.

from the—otherwise supreme—government of the community, and is habitually obeyed by this government from fear of such withdrawal, I think we must regard the said individual as possessing supreme political power. And the same may be said if, in place of an individual, we have a body completely capable of corporate action,—I mean a body that can act corporately at any time without material delay, and which has not materially more difficulty in acting than in not acting. For instance if, in a country under simple parliamentary government, any constituency could dismiss its representatives at any time by the vote of a simple majority,—means being provided for enabling it to meet and vote, on the requisition of a certain not too large number of electors—and if, in consequence, the mandates of the constituencies were habitually obeyed by the representatives, it could hardly be doubted that the electorate was sovereign.

§ 3. There are other cases, however, in which it is less clear whether the power of dismissal implies supreme political power.

Suppose that the body which *can* dismiss the otherwise supreme government does not dismiss it and gives no directions. Is it still supreme?—assuming that its inactivity is not due to fear. I think we must say that the power of dismissal—or any other power of giving orders—is still *possessed* though it is not *exercised*; assuming that the inactive organ would be obeyed if it gave orders. But it should be noted that in practice there is usually a difficulty in ascertaining whether a power that has remained long unexercised has not wholly or partially decayed. This point will be further discussed presently:—meanwhile, on the assumption that no such decay has taken place, I think we must attribute supreme power to any individual or body completely capable of corporate action, which admittedly can withdraw power at will from a government otherwise supreme.

But the case is different if the power can only be withdrawn at the end of a certain period; since then it is

possible that the organ which can thus withdraw power might not be obeyed during the interval by the organ from which it can withdraw it. Suppose an irresponsible dictator appointed by a popular assembly for a term of years and not desiring reappointment; surely he must be held to be temporarily sovereign. Suppose, however, that holding office for a fixed period he desires reappointment; then, so far as the directions of the assembly are in consequence habitually obeyed by him, we must say that it exercises supreme power; and if we can be sure that they *would* be obeyed, we must say that it *has* supreme power though it does not exercise it. But it is obvious that the extent to which power *is* possessed under these circumstances by a body that does not exercise it cannot be certainly known but only conjectured with a varying degree of probability.

But further; we have to take note of cases in which the body constitutionally qualified to dismiss and direct the permanent organ of ordinarily supreme government is not completely capable of corporate action. For instance, the body in question may not be always in existence as a body, or may be incapable of acting corporately in relation to a given question, unless the agreement of considerably more than a simple majority of its members can be attained. Suppose that a Parliament can dismiss the executive, but cannot meet without the consent of the executive except in the first year of every four; it is evident that for three years its power over the executive will not be greater than if the latter held office for a fixed period. Suppose, again, that in a federal polity the legislatures of the part-states have an undisputed right to change the constitution, but only by the vote of three-fourths of their number; it may be that, although there are many changes desired by a clear majority both of citizens and of part-states, there is no change whatever on which the agreement of so large a number is attainable; the body that would be supreme if it acted may be unable to act at all. We may still say in a certain sense that sovereignty belongs to the legislatures of the part-states;

but only in a very peculiar sense, which it is necessary to explain if the statement is not to be misleading.

§ 4. This last consideration leads naturally to a question which has sometimes been placed in the forefront of the whole discussion. If we attribute supreme power to a body that has a constitutional right to change the structure and regulate the action of government, even when this power can only be exercised by a majority so large as to be rarely attainable, ought we not on similar grounds to attribute it to the mass of the people in any state? since in any state, if a sufficiently large majority of the people altogether refused obedience, the power of government would come to an end.

I think we must admit[1] that there is, therefore, a certain sense in which the mass of the people in any country may be said to be the ultimate depository of supreme political power. Still, to say without qualification that the people is everywhere sovereign would be altogether misleading; since the statement would ignore the fundamental distinction between power that is unconsciously possessed—and therefore cannot be exercised at will—and power consciously possessed. An aggregate of men do not become conscious of their power as a body, until they become confident of mutual co-operation for the realisation of common wishes; and this confidence is, under ordinary circumstances,[2] only acquired gradually by the habit of acting in concert. Accordingly, when the governed are without the habit of acting in concert, they are, as a body, unconscious that they possess the power of refusing obedience to their government. Even the knowledge that, if an overwhelming majority agreed to refuse obedience, it could not be enforced, and that an overwhelming majority would be glad to disobey if each could rely on the co-operation of the others, would not necessarily give a consciousness of power to disobey with impunity: since mutual communication sufficient

[1] Unless we deny that the possession of power can be unconscious; and it would be paradoxical to deny this in the case of an individual.

[2] In exceptional cases it might be called out rapidly, by some violent and sustained excitement of popular emotion.

to produce the requisite mutual reliance may be wanting; and in its absence, each and all may be effectually restrained from disobedience by fear of the penalties it would entail. So far as the Government is, for this reason, able to count on the obedience of the mass of the people, in spite of their dislike to what is commanded, though we may still attribute power to the latter, we must add the fundamentally important qualification that it is an unconscious and unexercised power.

The case is different if the conduct of Government is to any extent determined by fear of a general refusal of obedience on the part of the governed, even though the latter are not conscious of so determining it. It may perhaps be urged that this hypothesis has hardly any practical importance; for granting that Government *might* behave so as to cause a complete refusal of obedience by an overwhelming majority, no such behaviour is within the limits of probability, and the fear of it is not actually a motive influencing Government. The worst that any government actually fears from its subjects is *partial* resistance, disorder, and conflict, in which Government may be beaten; and it may be said that the suggestion of such conflict is incompatible with our fundamental assumption that order is maintained. But I think that—though it is legitimate to assume that the States which we contemplate are not actually anarchical and disorderly, since many States are for long periods approximately exempt from these conditions—our suppositions will be too remote from the facts if we assume that the fear of causing disorder is not a restraining force, operating to keep the exercise of the power of any nominally supreme government within limits. Such limits to governmental power are doubtless ordinarily indefinite, but they must be held to exist in the most orderly States; though there may be cases in which the limits are only potential, because the government has no actual desire to do anything which would provoke disorder. And, so far as we thus recognise the fear of disorder as an actual force restraining Government,

we must correspondingly recognise an unconscious exercise of political power by the people at large, even in the least democratic communities.

The difference is doubtless vast between such unconscious exercise of power by the mass of the governed, as may exist under an oligarchy or an absolute monarchy, and the "active consent" to the operations of government which we have regarded as characteristic of democracy. Still the interval between the two is filled up by various degrees of conscious imposition of popular wishes on government, which we may regard as inchoate democracy. I do not consider that democracy is fully developed until the mass of (at least) the male adults have the regular function of electing their government or determining its rules of action, or both. But before this stage is reached the mass of the people may have more or less effective means of impressing their wishes on their government.

A case deserving special notice is where the mass of the people have no constitutional rights, but have recognised leaders whom the government credit with the power of producing dangerous disorder, and consequently fear to displease. In this case, though the influence of the leaders over their followers is not strictly political power,—since the obedience of the followers is not due to their fear of the leaders,—the power of the leaders over the government must be admitted to be political. We should, indeed, regard its existence as incompatible with perfect political order: but it is important to recognise that without actual disorderly violence, or refusal of obedience to the ordinary government, the distribution of political power may be materially modified for an indefinite period by the fear of *possible* disorder. In considering before the case of a chief priest dismissing the secular government, I assumed for simplicity that his power to dismiss was so unquestioned that its exercise would not be resisted. But more ordinarily the extent to which obedience would be withdrawn, if the monarch refused to conform to the priest's direction, would only be partial: so that the priest's power, like that of the

popular leader here spoken of, would be based on the fear of disorder.

Here we may recur again to the question before raised, whether political power long unexercised has decayed or still exists unchanged: since the reason why it is often difficult to answer this question is that a power formally attributed to a certain organ of government which has for a long time not been exercised, cannot be exercised without a breach of custom. It may be that this breach of custom would only cause surprise and moral disapprobation: if so, the power in question must be held to be still in full vigour: but if there is a danger that its exercise would provoke resistance and disorder, and if the fear of these consequences prevents its exercise, it must be admitted to have decayed.

§ 5. The modifications in the distribution of political power produced by the fear of disorder, in any of the ways just discussed, cannot be ignored if we are seeking a complete answer to the question where supreme political power rests in a given State. At the same time, if the question is asked with reference to a class of States defined as possessing a certain governmental structure—especially a certain definite allotment of Legislative, Executive, and Judicial functions to distinct organs,—we cannot take account of modifications of this kind; as we cannot infer from a mere contemplation of the form of the polity to what extent or in what precise manner they will occur. For a similar reason, if we are considering this abstract question, we must extend still further the assumption that the State contemplated is in an "orderly" condition: we must take "order" to include not only obedience on the part of the bulk of the governed, but observance of assigned limits on the part of the organs. In illustrating this, I shall assume for simplicity that the constitution provides no legal method of changing the constitutional allotment of powers, though it may be substantially modified by custom and convention. So far as the constitution is legally changeable, it is obviously in a sense true that supreme power rests with the aggregate of individuals or bodies whose con-

sent can legally change it;—putting disorder and the fear of disorder out of account. Still, in proportion as the process of change is difficult, and requires the concurrence of several distinct bodies or individuals, and perhaps also more than a bare majority in one or more of these bodies, the formally unlimited power of changing the constitution becomes practically reduced by the difficulty of putting it into operation; so that the question how political power is distributed so long as the constitution is unchanged becomes correspondingly more important.[1] And this is, of course, the only question that we have to consider, in respect of the attribution of supreme power, if the constitution is legally unchangeable,—so long as we exclude disorder and the fear of disorder. If then, we are to answer this question from a consideration of the constitutional allotment of powers, we must assume that no organ will act contrary to the design of the constitution and misuse the power entrusted to it, in order to encroach on the sphere of power assigned to any other organ. For such encroachment is likely to be resisted by other parts of government: and we cannot say whether it will be successful or not, without knowing more of the state of public opinion than we can reasonably infer from the form of the polity. It is quite conceivable that an attempted perversion of the original design of a constitution might—by favour of public opinion—be successful in one State, though it would be generally disapproved and successfully resisted in another State with a similar constitution: the manifestation of public opinion acting partly as moral pressure on the other organs that might otherwise resist the encroachment, partly as indicating on which side the physical force would lie if the dispute between the organs of government became a conflict *à outrance*.

For instance, suppose that, in a State with a new Constitution, all appointments in the military and civil service have been expressly given to a hereditary (or elected)

[1] This is strikingly exemplified—as I have before observed—by the United States of North America.

head of the executive, while the power of determining the annual budget is given to a representative assembly; and suppose that the assembly refuses its assent to necessary taxation in order to force the head of the Executive to give the most important employments to members of Parliament. This might fairly be regarded as a palpable perversion of the design of the constitution: and being so regarded, it might be held to justify the Executive in raising, without the consent of the assembly, taxes previously granted;—even though the latter step would be a more palpable violation of the constitution than the former. For since this step would be taken in order to defend the constitutional division of powers, its conservative intent might be so widely held to justify its revolutionary character that the unconstitutional taxes would be paid without serious resistance. Whether this would or would not be the case cannot be predicted from a mere study of the form of government[1]: it must depend on the actual condition of public opinion in the community in which the experiment is tried.

So again: where the Executive has the power of adding new members to the Senate without a definite limit of number,[2] it may fairly be contended that it is the constitutional duty of the Executive to select the persons generally best qualified to be senators, and that it would therefore be a palpable misuse of the power if an unusually large addition were made to the senate in order to obtain a majority in favour of a particular measure: and if the Senate were strong in prestige and popularity, public opinion might support it in treating this use of the power of the Executive as a disorderly proceeding, and meeting it with a novel resistance.

I have taken cases in which the encroachment is manifest and palpable; but if the clauses of the constitution are ambiguous, it is of course quite possible that similar conflicts may arise between different parts of the supreme government without any intention of encroach-

[1] Much would depend on the line taken by the subordinate officers of the executive.

[2] As is the case in England with the House of Lords.

ment on either side; each party being sincerely convinced that it is acting in accordance with the design of the constitution.

It may be suggested that in such cases of dispute the decision must rest with the constitutional authority to which the function of interpreting the Constitution is assigned; and which must at any rate decisively determine the *legal* distribution of power, though the customary or conventional distribution may diverge from the legal. But the existence of such an authority does not remove the danger of encroachment; since the interpreting body itself may not perform—or may be thought not to perform—its assigned function properly. Let us suppose, for example, that this interpreting body is the highest court of the ordinary judiciary. In considering how this court will decide a constitutional dispute we have to distinguish between (1) what the judges would decide *quâ* experts, assumed to have the single-minded aim of performing properly the function assigned by the Constitution, and (2) what they are likely to decide, assuming them to be average men, morally speaking, and accordingly actuated by mixed motives.

Even what the judges *quâ* experts would decide, in the case of such encroachments and disputes as we are considering, is not quite clear; since, in such cases, both rules of interpretation and precedents are likely to be doubtful: and even an expert and disinterested interpreter may be reasonably expected, in such cases, to be influenced by considerations of political expediency—among which the actual state of public opinion will be not unimportant. But what the actual judges will decide must always be still more doubtful; since the conditions of appointment, dismissal, and promotion of judges must be taken into account; while yet the force they are likely to exercise cannot be exactly estimated. *E.g.* if a monarch can appoint or dismiss the members of the body that interprets the constitution, this makes it more likely that they will decide a disputed question in his favour; but it is not therefore certain that they will do this in cases in which the verdict of unbiassed experts would clearly go

the other way, since they may be more afraid of the loss of reputation and self-respect than of dismissal.

Finally, before concluding this discussion, I must notice another transfer of political power which may take place without disorder in a polity where the governed elect the governors—*i.e.* transfer to leaders of opinion outside the Government, whose directions to the Government are to some extent obeyed, from fear that otherwise they will use their influence over the electors to prevent the reappointment of the governing persons. To what extent this transfer will take place we cannot tell from the form of the polity, but we must recognise that it *may* take place to an indefinite extent.

§ 6. I have discussed at length the various points to be determined in seeking a precise answer to the question "where supreme political power resides" in any State; partly because I think that they have not been adequately considered by the followers of Austin and other writers, who appear to assume that the question always admits of a simple answer. My view, on the contrary, is that a simple answer must almost always be incorrect, in the case of modern constitutional governments, unless a peculiar and carefully limited meaning is given to the question; and that even if it is saved from incorrectness by careful definition of the question, a simple answer is still liable to be misleading, because it unduly concentrates attention on an arbitrarily selected portion of the facts to which it relates. I hold that, in a modern constitutional State, political power that is not merely exercised at the discretion of a political superior,—and that must therefore be regarded as supreme or ultimate —is usually distributed in a rather complex way among different bodies and individuals; though, as I have said, it is also important to bear in mind that from the mere form of government in any state we can only conjecture very incompletely the actual distribution of the power of producing political effects.

My reasons for this view have been sufficiently explained in the preceding discussion; but they will be further illus-

trated by considering the question in relation to the forms of government which we have been chiefly led to contemplate in our attempts at political construction.

I. Let us first assume that the Constitution is what I have called flexible—*i.e.* that there is no formal distinction between ordinary legislation and the process of changing the Constitution. *Primâ facie*, in such a form of government supreme power rests with the ordinary legislature, as it can make any change in the constitution, without regard to the wishes of any other body. But we have to recognise that this power is confined within limits by the fear of provoking disorder; and in the case of a legislature that contains a representative assembly, it is, I conceive, ordinarily limited by a clear, even if unexpressed, understanding that this part of the legislature shall not be deprived of its representative character. A state of opinion is indeed conceivable in which the English—or any similar—Legislature might abolish the representative character of the House of Commons by statute: but I conceive that such a change would, in any case, be regarded as a breach of established order. I shall assume, therefore, that however flexible a Constitution may be, its flexibility is limited by the condition that elective organs must remain elective.

1. Suppose Simple Parliamentary Government, with a single chamber appointed for a fixed period, the executive having no share in legislation. Here the chamber *may* be temporarily the sole possessor of supreme power—within the vague limits which it could not transgress without danger of causing disorder—but only if the members do not desire re-election; so far as they desire re-election—whether on public or on private grounds—a share of supreme power will be possessed by the electorate, in virtue of their power of future dismissal. But the extent of the electorate's power may vary very much with variations in (1) the duration of Parliament, (2) the activity of the political consciousness of the electors, (3) their personal independence, (4) the possibilities of modifying the franchise. It would be practically at the maximum if parliaments

were annual, if all the electors had a continued active interest in public affairs, and were prepared at any moment to meet and vote resolutions or sign petitions, and if no alterations of the franchise were practically available in the interest of the party dominant in Parliament; provided also that the legislators could not personally influence the electors by hope or fear without losing more through general disapprobation than they would gain by bribery and intimidation. But in any particular case it may be indefinitely less than this.[1]

Further, the influence exercised by leading men on the people at large,—or by committees of a party character, elected to watch legislation and advise the representatives —may give these individuals or bodies some power over Parliament, and therefore some share of supreme political power; though it will not diminish the political power of the electorate—according to the view that we have been led to take of political power.

2. If the Supreme Executive have the right of dissolving Parliament, the power of the latter will be diminished in two ways: it will have less control over the executive, and will itself be more under the control of the electorate, to which appeal may be made at any moment.

3. Suppose Simple Parliamentary Government with two chambers formally co-ordinate in power. If they are both elected, the share of power belonging to the electorate will not be greatly affected by the duality of the chambers. If one chamber were hereditary or co-optative, then its power—if the two were really co-ordinate—would be equal to that of the electorate and the elected chamber taken together, within the limits imposed on Parliament by the fear of provoking disorder, if these limits could be definitely known; but as they cannot be definitely known, the elected chamber is likely always to have more weight, whenever the danger of

[1] On the other hand, if the electorate had the constitutional right to control by binding resolutions the action of Members of Parliament, it would have the supreme power. But I should hardly call this Parliamentary Government.

disorder comes into consideration at all, because the physical force of the mass of the people is likely to be on its side.

But a further consequence follows from the duality of the chambers: the legislative body formed by the two chambers is not "completely capable of corporate action;" it can only control the executive by fresh legislation if the two chambers agree, and a minority of the whole body—*i.e.* somewhat more than half the members of either chamber—suffices to prevent such agreement. Hence the power of the executive is increased, though precariously: it becomes independent within the limits of the existing law and any further limits imposed by the known opinions of the electorate, so long as the two chambers do not agree.

So far as the two chambers are not really co-ordinate, the distribution of power will be further varied.

4. Suppose the Executive has an effective absolute veto and is undismissible: then it has independent supreme power within the limits of the existing law, and any further limits that may be imposed by the fear of provoking disorder.

Suppose it has a qualified veto, capable of being overridden by a two-thirds majority of the legislature: then its power may at any given time be as great as if it had an absolute veto; but it is necessarily more precarious, and fluctuates with the state of parties in Parliament.

It may be said that a Parliamentary majority might coerce the executive by refusing supplies. But I conceive—as I have before said—that such action might be disorderly under a new constitution, in which a veto had been expressly given to the executive [1]; though in this and other matters the legal distribution of power may be modified by custom to an indefinite extent.

II. Let us now assume that a single-chambered parliament is controlled by a rigid constitution, not capable of being altered except by consent of the electorate. Then two fresh considerations affect the distribution of political

[1] In some cases such action on the part of Parliament might be justified by the manner in which the veto had been exercised.

power: the mode of *altering* the constitution, and the mode of *interpreting* it. If any change supported by a considerable body of citizens must necessarily be brought before the electorate for decision, and might be carried by a bare majority of voters, the electorate would be undoubtedly supreme; but it would be misleading to call it sovereign, without qualification, unless it could decide all matters by a bare majority; since, in proportion as the majority required for making constitutional changes is increased, an increasing share of power is left, though precariously, to the ordinary legislature.

If, on the other hand, changes in the constitution can only be initiated by Parliament, the distribution of power between Parliament and the electorate at any given time will be practically the same as if the constitution were flexible, within the limits fixed by the constitution: only, in proportion to the difficulty of formally altering the constitution, both Parliament and the electorate will be restrained by the action of their predecessors.

The restraint becomes practically greater if we suppose a two-chambered parliament, or a veto—absolute or qualified—vested in the head of the executive.

In any case, the greater the difficulty of altering the constitution, the more important becomes the question of its interpretation.

1. If an elected Legislature is the authorised interpreter, the constitutional restraint on legislation becomes insignificant, so far as the meaning of the rules is ambiguous; since we may assume that the legislature will decide doubtful points in favour of its own powers and aims. But we cannot assume that an express and clear constitutional rule will be disregarded either by the legislature or by the electorate. Such a perversion of the function of interpretation might no doubt occur; but it would be disorderly, and would go far to justify the resistance that it would be likely to provoke.

2. This is still more clear if the interpretation of the constitution is entrusted to an adequately independent

judiciary: as the professional function of judges is to interpret faithfully rules of law, it would be a still more palpable and inexcusable breach of duty on their part to prevent the plain meaning of the constitution. Hence it seems to me an exaggeration to say with Mr. Dicey[1] that, under the circumstances supposed, the bench of judges "is not only guardian but master of the constitution." No doubt, so far as the meaning of any constitutional rule is ambiguous, the interpretative function will give a limited power of practically determining it; but I conceive that the judges will usually be restrained by more than moral sanctions from a palpably perverse interpretation. Firstly, the independence of the judges is compatible with liability to impeachment for palpable breach of duty; and if this liability is imposed it is clear that they will be restrained by fear of impeachment; and even if they are constitutionally irremovable and absolutely limited in number, I conceive that they would still be restrained by the fear of provoking disorder.[2] For, if the other organs of government had recourse to revolutionary remedies to prevent the misinterpretation from taking effect, the responsibility for the revolution would lie with the judges.

3. If the interpretation of the constitution is entrusted to a body of judges whose conditions of appointment and removal are calculated to impair their independence, the power normally connected with the interpretative function is liable to be partly transferred to the organ or organs that appoint or remove the judges. This transfer, however, is of the kind that I have regarded as essentially disorderly, as it depends on an actual or forced misuse of the power of appointment and removal.

§ 7. I have spoken of the power exercised on government by the fear of violent disorder as belonging to the

[1] *Law of the Constitution*, p. 164 (3d edition).

[2] If the court were irremovable but not constitutionally limited in number, it would be possible to prevent or cancel a perverse decision by adding new judges; and the remedy, though semi-revolutionary, would be justified, if provoked by a palpable breach of duty on the part of the existing judges.

"mass of the people." I have now to observe that this must not be understood to imply that different sections of the people are formidable in proportion to their numbers: or that when appeal is made to physical force, still the victory is certain to rest with the numerical majority. In some arguments for pure democracy this seems to be vaguely assumed; but there is no ground for assuming more than that numbers will prevail other things being equal, and in fact other things never are equal. Some members of a community always greatly surpass others in fighting force, either through physical strength and endurance, or vigour of resolution, or habits of co-operation, or skill due to training and practice, or the power to purchase weapons.

This is indeed recognised by those advocates of democracy who wish to confine the franchise to male adults; they make a point of urging that if it came to physical strength the women would have to give way, and therefore that a democratic government which might have a large majority of men opposed to it would be wanting in stability. There is some force in this argument; but in a civilised society the difference between soldiers and ordinary civilians is practically even more important; since in any modern state the mass of the army is more likely to take a side opposed to the mass of civilians, than the mass of men are to be opposed to the mass of women.

In fact, if in a modern civilised state there is a standing army of considerable size—as large as the actual standing armies of the larger European States—and if the rest of the community are untrained in the use of arms and in military movements, it must be evident that the action of the soldiers will be decisive in any civil conflict, unless a substantial part of the army is opposed to the rest. And owing to the habit of prompt and unquestioning obedience to superiors that is ordinarily maintained in an army—and must be maintained if it is to be efficient—it is not unlikely that the concert of a small number of officers of high position may determine the action of the whole army, or at least of an overwhelming majority of soldiers.

Hence arises a serious danger to constitutional government. The best political method for meeting this seems to be a general military training of the citizens: so that there may be always a large proportion of them who, while not forming part of the actual standing army, are capable of being rapidly organised into an effective military force. Otherwise the irresistibility of the army will be liable to cause a strong temptation to use it to cut the tangled knot of a serious political dispute; and the habitual consciousness that there exists in the state a power superior both to the law and to the popular will may materially interfere in various ways with the proper working of the constitution. At the same time even universal military training is liable to be of little avail at a crisis without arms and ammunition; while, if we suppose these to be extensively possessed by ordinary citizens, the danger of violent civil strife would seem to be materially increased.

§ 8. The question remains, how far we may rely on constitutional or political morality, under such a form of government as I have gradually sketched out, to obviate the danger of violent disorder. And this leads us once more to the more general question of the right of insurrection against an established government, which we already had occasion partially to consider.[1] A legal or constitutional right of insurrection is an absurdity, if not a contradiction in terms; but, in the present period of political thought, few would contest the moral right to resist and overthrow established rulers in extreme cases of misrule, under most forms of government; and, accordingly, I have assumed the existence of such a right in earlier chapters. Few, on the other hand, would deny that such attempts at resistance and revolution ought only to take place in extreme cases, when there appear to be no milder means available for remedying either grave practical misgovernment, or persistent deliberate violation of established and important guarantees for good government. In some arguments for democracy, however, it seems to be implied—I do not remember to have seen it

[1] See chap. xiv. § 3, chap. xv. § 5, chap. xvi. § 6.

expressly asserted—that when popular government is fully developed the right of insurrection must be held to have become obsolete; on the grounds that the resistance of any part of a community to the "will of the whole" must be (1) immoral, owing to the indisputably superior right of the whole; and (2) futile, owing to its irresistibly superior might. In either argument there is an element of sound reason, but in both cases it is palpably inadequate to support the practical conclusion.[1]

Firstly, the community has, in my view, an indisputable right to impose on its members the observance of whatever rules it is conducive to the general happiness that they should be made to observe. And if it is disputed what rules have *this* quality, there is a certain presumption, other things being equal, that the regulations preferred by the majority are more likely to be conducive to the general happiness than those preferred by the minority; since, so far as each knows best and is most concerned to provide what tends to his own happiness, the alternative preferred by the larger number may, *ceteris paribus*, be expected to be productive of the larger amount of happiness. But where parties are nearly evenly divided, this presumption is obviously very slight; and even if the majority is more decided, the presumption may easily be overborne in particular cases by other considerations. It may be evident that those who form the minority possess superior knowledge and foresight of consequences, or that the damage done to them by the regulations preferred by the majority will outweigh the gain to the latter, or that, for any other reason, the desires and aims of the minority are more likely to coincide with the real ultimate interests of the whole.

On one or other of these grounds the evils of insurrection may reasonably be thought to be outweighed by the evils of

[1] In the discussion that follows I omit, for simplicity, the consideration of cases in which, owing to a conflict among the recognised organs of supreme government, it is doubtful which of the contending parties really represents the established constitutional order. But we hardly hope that the most carefully devised constitutional arrangements can altogether prevent conflicts of

submission, when the question at issue is of vital importance, if the insurgents have a fair chance of maintaining an equal fight, or even sometimes if they can only give trouble enough to alarm the majority. Even the former supposition is not violently improbable, for, as we have already seen, the presumption that the preponderance of physical force will be on the side of the majority is almost as slight as the presumption that it will be in the right. It may, indeed, be said that an insurrection against a government supported by an organised democratic majority is, on the whole, likely to be more disastrous in its effects than an insurrection against a tyrannical monarchy or oligarchy; since the latter may be brief and bloodless, owing to the manifestation of overwhelming physical force opposed to the government, whereas in the former case the rebels can at best expect a balanced conflict.[1] But the conflict, though balanced, need not be prolonged; for where there are solid reasons for insurrection, the manifest determination of the minority to fight may dispose the majority to a reasonable compromise; since they may easily be less eager to oppress than the others to escape oppression. For this latter reason an insurrection may sometimes induce redress of grievances, even when the insurgents are clearly weaker in physical force; since it may bring home to the majority the intensity of the sense of injury aroused by their actions.[2] For similar reasons, again, a conflict in prospect may be anticipated by a compromise; in short, the fear of provoking disorder may be a salutary check on the persons constitutionally invested

[1] This difference would not hold universally, even apart from the possibility of compromise; since, on the one hand, habits of obedience, regard for legitimacy, and aversion to disorder, would often secure strong support even for a tyrannical and unpopular monarchy and oligarchy; and, on the other hand, when there is a large standing army, a democratic government may be briefly and almost bloodlessly overthrown by a military combination. But in the latter case the resulting government is not generally likely to be stable or beneficent; so that the bad consequences of the conflict are likely to be grave and profound, even though the conflict is brief.

[2] There is, I conceive, no presumption that superiority in intensity of conviction will be found on the side of the majority; the presumption is the other way.

with supreme power under a democratic as under other forms of government.

I conceive, then, that a moral right of insurrection must be held to exist in the most popularly governed community. In saying this I do not mean to imply that this violent remedy ought to be frequently used, or that it is likely to be brought into operation frequently in a modern civilised society. In such a society, the interest of the citizens generally in the maintenance of order is so great, that the victims of democratic oppression will usually find resistance hopeless; they will have to submit or depart with the best terms that they can obtain from the triumphant majority. Still I think it important to dispel the illusion that any form of government can ever give a complete security against civil war. Such a security, if attained, must rest on a moral rather than a political basis; it must be maintained by the moderation and justice, the comprehensive sympathies and enlightened public spirit, of the better citizens, keeping within bounds the fanaticism of sects, the cupidities of classes, and the violence of victorious partisanship; it cannot be found in any supposed moral right of a numerical majority of persons inhabiting any part of the earth's surface, to be obeyed by the minority who live within the same district.

Indeed, if the "divine right of majorities" was ever accepted as a rational basis for political construction, its application could hardly be made to depend on the established boundaries of actual states, in the determination of which historical accidents have played so large a part; while if it is applied without regard to these established boundaries, it would lead naturally to an indefinite disintegration of political societies; since a faction that was in a minority in the whole state would probably be in a majority in some districts, and might accordingly, on this principle, claim to be governed according to its wishes in these districts. And, in fact, some of those who hold that a government, to be legitimate, must rest on the consent of the governed, appear not to shrink from drawing this infer-

ence; they appear to qualify the right of the majority of members of a state to rule by allowing the claim of a minority that suffers from the exercise of this right to secede and form a new state, when it is in a majority in a continuous portion of its old state's territory.[1]

I have already suggested that a democratic state will naturally be disposed to concede local autonomy to its parts, to the utmost extent compatible with the interests of the whole; and I conceive that there are cases in which the true interests of the whole may be promoted by disruption. For instance, where two portions of a state's territory are separated by a long interval of sea, or other physical obstacles, from any very active intercommunication, and when, from differences of race or religion, past history or present social conditions, their respective inhabitants have divergent needs and demands in respect of legislation and other governmental interference, it may easily be inexpedient that they should have a common government for internal affairs; while if, at the same time, their external relations, apart from their union, would be very different, it is quite possible that each part may lose more through the risk of implication in the other's quarrels, than it is likely to gain from the aid of its military force. Under such conditions as these, it is not to be desired that any sentiment of historical patriotism, or any pride in the national ownership of an extensive territory, should permanently prevent a peaceful dissolution of the incoherent whole into its natural parts. But to allow a general right of secession on the ground of its conduciveness to the interests of the seceders alone, would be inconsistent with the fundamental principles of political reasoning assumed throughout this treatise. And I may observe that if such a right be once admitted, I see no reason why its application should be limited by mere considerations of the

[1] The right of disruption was partially considered in chap. xiv. § 3 but I there deferred the final discussion of it, because it seemed to me then premature to explain exactly how far and in what sense I held the legitimacy of government to depend on the consent of the governed.

size or continuity of the territory in which the seceders were in a majority; consistency seems to require us to allow the whole community to be resolved into a congeries of separately governed groups, each member being free to select his own political government, without changing his residence, just as he is now free to select the ecclesiastical government that he will obey. For though the secession of any such group would inflict extreme inconvenience on the rest, it would often not inflict more inconvenience than the separation of a continuous portion. *E.g.* if, in the time of the Commune, a separation of Paris from France had been peacefully decreed by a majority of Communards, it would have been as great a blow to the national existence of France as if the Protestants throughout the country had been allowed to live under their own government.

The suggestion just made may seem too absurd; but principles are often best tested by extreme cases. It is important to see clearly, that a form of government which shall enable every one to "obey himself alone" is chimerical. The coercion, by physical force in the last resort, of well-intentioned adults, is an evil which we cannot hope to eliminate by any constitutional reforms; though to diminish it without sacrificing other benefits is doubtless among the most legitimate and important aims which constitutional reformers can propose to themselves.

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